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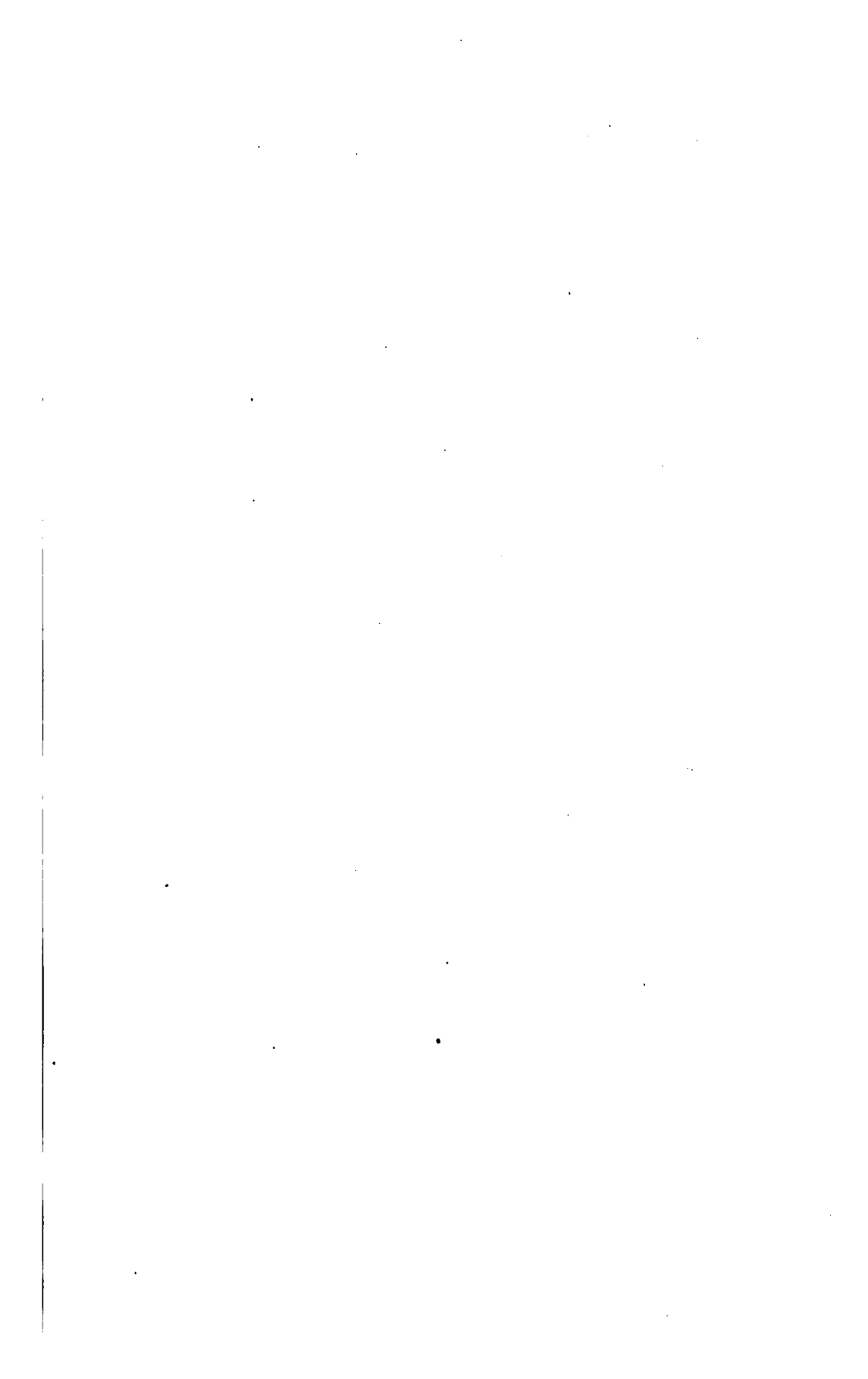
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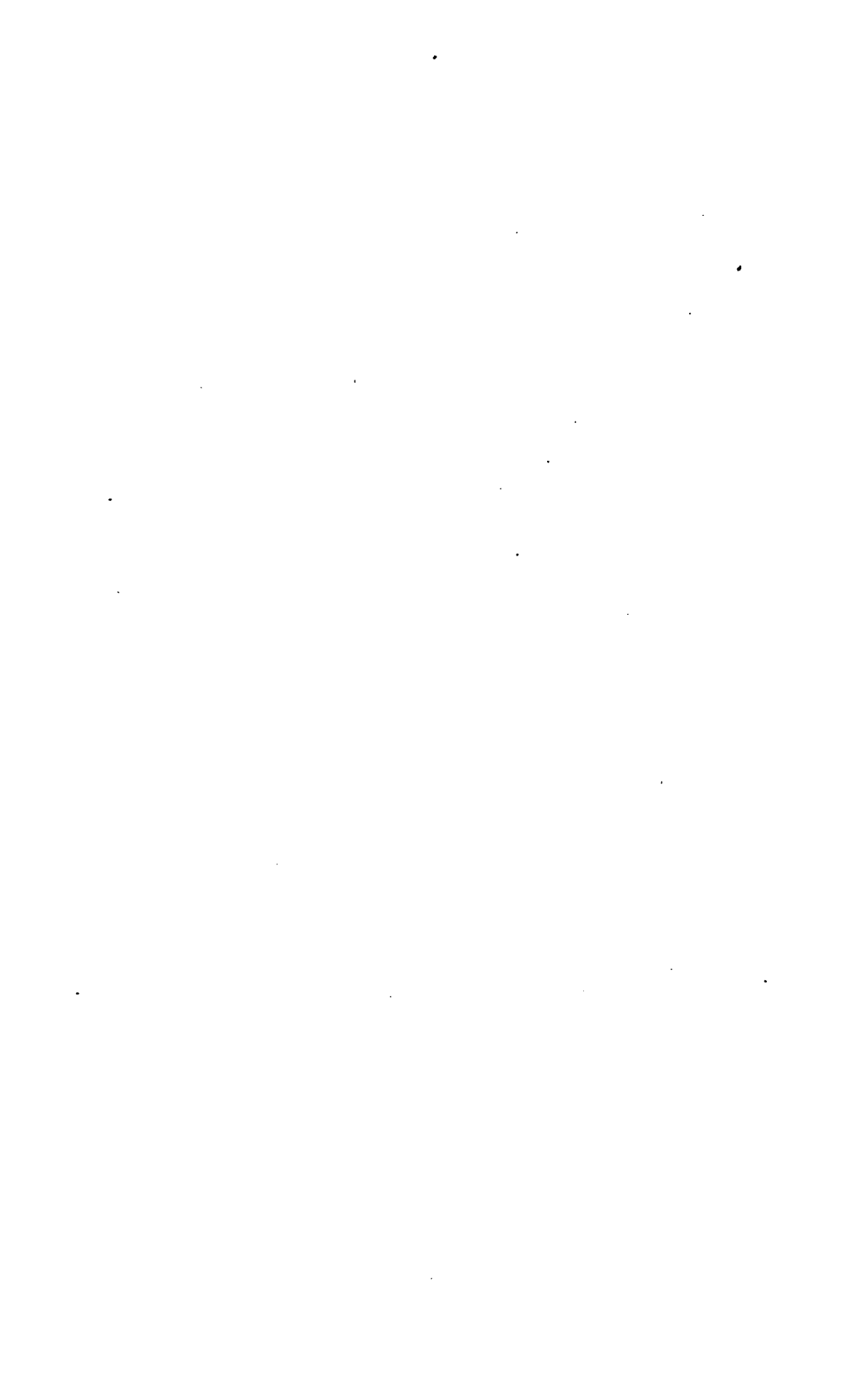


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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA

WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED,
AND AN INDEX

WILL H. ADAMS
OFFICIAL REPORTER,

WILBUR G. CARPENTER,
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LUCY H. WILHELM,
ASSISTANTS.

0

VOL. 71

FORT WAYNE PRINTING COMPANY
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FORT WAYNE, INDIANA
1921

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA

DURING THE PERIOD COMPRISED IN THIS VOLUME

HON. IRA C. BATMAN§†
HON. ALONZO L. NICHOLS¶*
HON. WILLIS C. McMAHAN*
HON. CHARLES F. REMY*
HON. SOLON A. ENLOE*
HON. ETHAN A. DAUSMAN†

§Chief Judge, November Term, 1919.

¶Chief Judge, May Term, 1919.

†Elected in 1916, and re-elected in 1920.

*Elected in 1918.

NOTE—Opinions herein by judges other than those named above
are opinions delayed by petitions for rehearing.

OFFICERS
OF THE
APPELLATE COURT

**ATTORNEY-GENERAL,
ELE STANSBURY**

**REPORTER,
WILL H. ADAMS**

**CLERK,
P. J. LYNCH**

**SHERIFF,
GEORGE D. ABRAHAM**

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CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM AND NOVEMBER TERM, 1919,
IN THE ONE HUNDRED THIRD YEAR
OF THE STATE.

KING v. HARTLEY.

[No. 9,880. Filed June 26, 1919.]

1. **APPEAL.—Review.—Findings.—Conflicting Evidence.**—The court on appeal will not disturb the findings of the trial court where the evidence is conflicting, unless the decision is contrary to law. p. 5.
2. **FRAUDS, STATUTE OF.—Oral Agreement to Buy Land.—Possession.**—Where a tenant in common in possession of land orally agreed to purchase the interest of a cotenant, the mere fact that he remained in possession was insufficient to take the case out of the statute of frauds, since there was no taking or change of possession under the terms of the contract. p. 5.
3. **FRAUDS, STATUTE OF.—Oral Agreement to Buy Land.—Payment of Purchase Price.**—Payment of the purchase price is not sufficient part performance to take out of the operation of the statute of frauds an oral contract for the sale of land. p. 9.
4. **PARTITION.—Action by Tenant in Common.—Parol Contract for Sale of Land.**—An action by a tenant in common against a cotenant for partition of the land cannot be defeated by proof that plaintiff had orally agreed to sell her interest to such cotenant in possession and that the purchase price had been paid, where such contract could not be enforced because it was within the statute of frauds. p. 9.

From Ripley Circuit Court; *Robert A. Creigmile*,
Judge.

King v. Hartley—71 Ind. App. 1.

Action by Grace M. King against Theophilus R. Hartley, who filed a cross-complaint. From a judgment for defendant on his cross-complaint, the plaintiff appeals. *Reversed.*

Francis M. Thompson, Thomas E. Willson, Romney L. Willson and Russell Willson, for appellant.

James H. Connelley and Korbly & New, for appellee.

McMAHAN, J.—Appellant commenced this action for partition of certain real estate. According to the allegations of the complaint, Sarah E. Hartley died intestate in 1885, the owner of the real estate in controversy, and left as her sole and only heirs the appellee, Theophilus R. Hartley, and certain named children, including appellant. Some of the children had conveyed their interest in the real estate to their father, Theophilus, and all who had not so conveyed were made defendants. The appellee filed an answer in four paragraphs; the first was a general denial, demurrers were sustained to the second and fourth, and the third alleged that appellant had agreed to sell her interest in said real estate to appellee by an agreement entered into in 1904; that thereafter appellee fully paid appellant the agreed price, and that appellee since said agreement was entered into has had exclusive possession of appellant's interest in said real estate, and, relying on said agreement, appellee has made valuable improvements upon said real estate.

The appellee also filed a cross-complaint to quiet his title to the whole of the real estate described in appellant's complaint against the appellant, alleging that Sarah E. Hartley died the owner of the real

estate, and that appellee, appellant, and the other children as set out in the complaint were her only heirs.

It is then alleged that appellant agreed to sell her interest in said real estate to appellee, that he paid her in full, and entered into possession and improved the same substantially as set out in the third paragraph of answer. Appellant filed demurrers to the third paragraph of answer and to the cross-complaint, which were overruled and exception saved. Appellant filed a general denial to the third paragraph of answer, and also to the cross-complaint. The cause was tried by the court. There was a finding against appellant on her complaint and in favor of appellee on his cross-complaint; that his title to the whole of said real estate should be quieted in him, and a decree was rendered accordingly.

Appellant filed a motion for a new trial, which was overruled and exception saved. The motion for a new trial challenges that decision of the court on the grounds that it is not sustained by sufficient evidence and is contrary to law.

The evidence shows without conflict that Sarah E. Hartley died intestate in 1885, the owner of a fifty-six-acre farm in Ripley county, and left as her sole heirs the appellee, who was her husband, and five children, of whom appellant was one. All of said children, except appellant, conveyed all their interest in said real estate to appellee before the commencement of this action. Appellant was between two and three years old when her mother died. The appellee and his five children lived together on the farm after the death of his wife. Appellant left home in 1900 and went to Cincinnati, and never thereafter made her

home with her father on the farm, although she returned there for short visits, during which she stayed with her brothers and sisters. After the death of his wife appellee took the active charge and control of the farm, which, when this action was begun, was worth about \$6,000.

The evidence relative to the alleged agreement of appellant to convey her interest in the real estate to appellee is conflicting. Appellant denies that she ever made such an agreement, while appellee testified that on December 31, 1903, he talked to appellant concerning the purchase of her interest in the farm; that she was twenty-one years old that day; that she said she would let him have her share of the place, and thought she should have \$200 for it, which was what the other children were getting for their interests. He then gave her \$10, sent her \$40 when she was in a hospital in Cincinnati and wrote asking him for money, and sent her \$20 in August, 1904, when she got married, telling her that he would send more when she made the deed, but she did not do so. He sent her \$50 in September, 1904, and paid her \$15 when her husband got hurt, and sent her five dollars in December, 1904, saying that this was the last payment he would make until he got the deed. She afterwards moved to Osgood and said she would make the deed, but never did so, although he paid her the rest in a range and other utensils. He has put \$200 worth of improvements on the land, and has paid off a \$400 mortgage on the farm. Appellant has lived near the farm, and has never said anything to him about having an interest in the land, although he has been in possession of the land ever since, and has paid each of the other children \$200 for their interests. The

day she was twenty-one she said: "Papa, you give me the money and I will make you the deed when I come out some time."

Where the evidence is conflicting this court will not disturb the decision of the trial court, unless the decision is contrary to law. Assuming, then,

1. that the facts are as testified to by appellee, we will proceed to ascertain whether the decision of the court is contrary to law.

Appellant contends that one who seeks to hold another to an oral agreement for the sale of real estate, in the face of the statute of frauds, must

2. show possession under the contract; that where the parties to such an agreement are tenants in common there can be no taking possession under the contract so as to take it out of the statute, as the possession by one tenant in common is the possession of all.

In the case of *Waymire v. Waymire* (1895), 141 Ind. 164, 40 N. E. 523, the court said: "The contract being by parol, and for the purchase of real estate, it is clearly within the statute of frauds. In order to take it out of the statute it must be alleged that the possession was taken under the contract. It is not enough that possession was taken, it must be taken under the verbal contract, and pursuant to its provisions. * * * The averment on that point in the first paragraph is, 'and went into possession of the same,' and in the third paragraph is, 'that he immediately moved upon and cleared up, put buildings upon, and other valuable and lasting improvements upon said land.' These averments fall very far short of alleging that appellant took possession of the land under or pursuant to the terms of the

contract, * * *. It is true, further on in the first paragraph it is averred that he 'has remained in possession of said real estate under said purchase ever since 1878.' But a mere remaining in possession under the terms of a parol contract of purchase of land is not sufficient to take the contract out of the statute of frauds. The possession must be taken or delivered under and pursuant to the terms of the verbal contract of purchase to take the case out of the operation of the statute of frauds."

In *Carlisle v. Brennan* (1879), 67 Ind. 12, the defendant sought by cross-complaint to enforce specific performance of a parol contract for the conveyance of land. The cross-complainant was in possession of the land at the time the alleged contract was made. She paid the contract price relying on a parol contract. But the court said: "There was no change of the possession of the real estate, no giving or taking possession thereof, under or pursuant to the alleged agreement or contract of sale. No change of possession was alleged; and, indeed, we think that the allegations of the cross-complaint affirmatively show that there was, in fact, no change of possession consequent upon, or pursuant to, such alleged agreement or contract of sale. For, as we have seen, it was alleged in her cross-complaint, that the appellee Ellen Brennan was in the possession of the real estate, when the appellant agreed and contracted to sell her the property. It follows, therefore, that the only part performance, if such it can be called, of the alleged agreement or contract of sale by the appellee Ellen Brennan, was the naked payment of the sums of money, which were to be paid by her, as she alleged, as the purchase-money of the real estate in contro-

versy. Says Mr. Browne, in his treatise on the construction of the Statute of Frauds, on the point now under consideration: 'And now, by an unbroken current of authorities, running through many years, it is settled too firmly for question, that payment, even to the whole amount of the purchase-money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract.' Section 461. This is the law in this State on the question we are now considering, as settled and declared in and by a number of the decisions of this court." See, also, *Johns v. Johns* (1879), 67 Ind. 440.

In *Pearson v. East* (1871), 36 Ind. 27, it was said: "While it is well settled that the taking of possession under a contract of purchase of real estate is sufficient to take the case out of the operation of the statute of frauds, it is equally well settled that simply to remain in possession is not sufficient, even though the purchase money may have been paid and improvements made."

In *Green v. Groves* (1887), 109 Ind. 519, 10 N. E. 401, it was averred in the complaint that at the time the contract was made and ever since until the institution of the suit the plaintiff was, and had been, in possession of the lots. The court said: "It thus appears that the possession was not given or taken, in pursuance or by reason of the contract. The possession, therefore, was not a part performance of the contract, so as to take it without the statute of frauds, because it preceded the contract. * * * It is said by a standard author: 'The general principle is, that the act of part performance must have reference to the contract, be in execution of it, and be an act which would be prejudicial to the party seeking perform-

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ance, if the agreement were not enforced. The act performed should tend to show, not only that there has been an agreement, but also to throw light on the nature of that agreement, so that neither the fact of an agreement, nor even the nature of that agreement, rests solely upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself.' Waterman, Specific Performance of Contracts, section 261. Neither the simple payment of a sum of money, nor, what is equivalent, payment in something else, or in some other way, nor the continuati^on of possession, existing prior to the alleged contract, tends to throw light on the nature of the contract, or to show that there was such a contract."

In *Riley v. Haworth* (1903), 30 Ind. App. 377, the court said: "The payment of a part or all of the purchase money is not such part performance as will take a parol contract for the sale of land out of the statute. * * * It is said that the important acts which constitute part performance are actual, open possession of the land, or permanent and valuable improvements made on the land, or these two combined. * * * But in order that possession may remove the case from the effects of the statute there must be an open and absolute possession taken under the contract, and with a view to its performance. The possession must be yielded by one party, and accepted by the other, as done in performance of the contract. If possession precedes the contract, or if the contract be with a tenant already in possession, and who continues in possession afterwards, the contract is within the statute, as in neither case was there a change of possession in execution of the contract."

Payment of the purchase price is not sufficient part performance to take the cause out of the operation of the statute of frauds. *Johnston v. Glancy*

3. (1835), 4 Blackf. 94, 28 Am. Dec. 45; *Mather v. Scoles* (1870), 35 Ind. 1, 5; *Suman v. Springate* (1879), 67 Ind. 115, 123; *Green v. Groves, supra*; *Riley v. Haworth, supra*.

Appellee practically concedes the law to be as hereinbefore stated, and that its application would defeat an effort on appellee's part to enforce the

4. specific performance of the contract, but he claims the contract can be used as a matter of defense, even though it cannot be used as a basis of affirmative action.

In *Johnson v. Pontious* (1889), 118 Ind. 270, 20 N. E. 792, the appellee defended the action, which was for partition upon the theory that he was the equitable owner of the land through a parol contract of purchase from his cotenants. He claimed to have made a parol contract for the land, to have entered into possession under the contract, and to have made valuable and lasting improvements thereon. The court held that the appellee could not defeat appellant's right to a partition by showing an equitable title, saying: "Unless there was a contract, possession taken under it, and a payment of the purchase money, the appellee held no equitable title and could not successfully defend the action on the ground of equitable ownership."

It is clear that the appellee could not, under the facts, set up the alleged parol contract for the purchase of appellant's interest in the real estate as a defense.

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The court also erred in entering the decree quieting appellee's title to the real estate in controversy.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

INDIANAPOLIS AND CINCINNATI TRACTION COMPANY v.
SENOUR, ADMINISTRATRIX.

[No. 9,752. Filed April 17, 1919. Transfer denied June 26, 1919.]

1. **APPEAL.—Briefs.—Sufficiency.—Rules of Court.**—Where appellant in the preparation of its brief has failed to some extent to comply with Rule 22 of the Supreme and Appellate Courts requiring an appellant to state, under a separate heading of each error relied on, separately numbered propositions or points, the court on appeal will not refuse to review the case, but will limit its consideration to such propositions or points as are properly stated and to those which, by their wording, clearly indicate the particular error to which they are directed. p. 14.
2. **NEGLIGENCE.—Pleading.—Contributory Negligence.—Statute.**—In view of §362 Burns 1914, Acts 1899 p. 58, plaintiff in an action for personal injuries need not allege his own freedom from fault, but a complaint will be sufficient in that respect, unless the fact of contributory negligence affirmatively appears on the face of the pleading. p. 16.
3. **STREET RAILROADS.—Operation.—Use of Streets.—Reciprocal Rights.**—The rights of a street railway company in operating its cars along a public street and of the public in traveling the street are equal, and each is bound to use ordinary care to avoid a collision. p. 16.
3. **STREET RAILROADS.—Operation.—Use of Streets.—Reciprocal road in Tracks.**—A street railroad company, as against the general public, has a preferential right to that portion of the street occupied by its tracks. p. 16.
5. **STREET RAILROADS.—Personal Injuries.—Questions of Fact.—Contributory Negligence.**—The mere fact that the driver of a team of horses entered upon the tracks of a street railroad after dark is not negligence *per se*, the question whether such conduct was contributory negligence depending upon the surrounding circumstances and the care used. p. 17.

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6. **STREET RAILROADS.—Personal Injuries.—Contributory Negligence.**
—Evidence.—Sufficiency.—In an action against a street railroad company for wrongful death, evidence held sufficient to warrant the inference that a wagon struck by a car while being driven along the tracks after dark carried a taillight as required by city ordinance. p. 17.
7. **STREET RAILROADS.—Personal Injuries.—Contributory Negligence.**
—Failure to Carry Taillight on Wagon.—Proximate Cause.—The failure of a wagon driver to carry a taillight on the wagon, although a violation of a city ordinance, would not defeat a recovery for personal injuries upon being struck by a street car while driving along the street car tracks, unless such negligence proximately contributed to the injury. p. 18.
8. **APPEAL.—Review.—Verdict.—Conclusiveness.—Conflicting Evidence.**—The determination of the jury based on conflicting evidence is conclusive on appeal. p. 18.
9. **STREET RAILROADS.—Personal Injuries.—Contributory Negligence.**
—Presumption.—A wagon driver who was struck by a street car while driving along the tracks after dark will not be presumed to have failed to look for the car that injured him, or, if he had in fact looked, to have failed to heed what he saw, where there was evidence tending to show that the wagon was struck by a car being operated at a dangerous rate of speed, while it was dark, without any lighted headlight, and without any warning of its approach. p. 18.
10. **STREET RAILROADS.—Operation.—Excessive Speed.—Rights of Wagon Driver.—Presumption.**—One driving a wagon along street railroad tracks is required to exercise ordinary care for his own safety, but in doing so has the right to assume, in the absence of some indication to the contrary, that the street railroad will not fail to discharge the duty it owes him, and within reasonable limits to govern his conduct accordingly. p. 18.
11. **STREET RAILROADS.—Personal Injuries.—Contributory Negligence.—Driving Wagon Along Tracks.**—Where a street railroad operated along a narrow street had scraped the snow to the sides of its tracks, so that it was practically impossible for vehicles to travel the street except upon the car tracks, and such practice became a custom, the driver of a wagon was not, as a matter of law, guilty of contributory negligence in driving his wagon along the tracks after dark. p. 19.
12. **APPEAL.—Review.—Instructions.—Invited Error.**—A party has no right to complain of an instruction given where he requested an instruction which embodied the same legal principle. p. 19.
13. **APPEAL.—Review.—Instructions.—Invited Error.—Presumptions.**—The court on appeal, in considering alleged error in in-

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structions given, will not presume, in the absence from the record of instructions tendered by appellant and refused, that any error committed by the court in instructing the jury was invited by instructions requested by appellant. p. 19.

14. **APPEAL.—Review.—Instructions.—Burden of Showing Error Harmless.**—Where appellee contends that error, if any, in instructions challenged by appellant was invited by instructions tendered by appellant and refused, the burden is on her to show that fact by having such requested instructions brought into the record, it not being incumbent on appellant to include them in the record where they are not essential to a determination of the questions presented by appellant relating to the instructions given. p. 19.

15. **TRIAL.—Instructions.—Consideration as a Whole.**—Instructions must be considered together. p. 20.

16. **STREET RAILROADS.—Personal Injuries.—Action.—Instructions.—Construction.**—In an action against a street railroad company to recover for the death of a wagon driver struck by a car, instructions upon reasonable care *held* not to charge defendant with knowledge acquired by it after the accident, in view of an instruction stating that the question of reasonable care, with respect to both parties, depends wholly upon the situation at the time of the accident, and not upon anything known or discovered thereafter which could not with reasonable diligence have been known or discovered before. p. 20.

17. **STREET RAILROADS.—Personal Injuries.—Action.—Instructions.**—In an action against a street railroad company to recover for the death of a wagon driver struck by a car, an instruction that the question of reasonable care, with respect to both parties, depends wholly upon the situation at the time of the accident, and not upon anything known or discovered thereafter which could not with reasonable diligence have been known or discovered before, *held* not misleading, considering the instructions as a whole, because failing to limit the facts and circumstances which might be considered by the jury. p. 20.

18. **APPEAL.—Review.—Instructions.**—Where, in an action for wrongful death, an instruction which was not mandatory and did not purport to cover all matters of law involving plaintiff's right of recovery, was applicable to at least a part of the evidence, it was not erroneous by reason of the fact that it might have been made fuller, especially in view of other instructions fully covering the matter complained of. p. 21.

19. **STREET RAILROADS.—Injuries on Tracks.—Care Required.—Violation of City Ordinance by Wagon Driver.**—Although a wagon driver, who was struck by a street car, was violating a city ordinance at the time of the accident by not having a tail light on his

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wagon, the street car company owed him the same duty which it owed the general public. p. 21.

20. **STREET RAILROADS.—Injuries on Tracks.—Action.—Instructions.—Care Required.**—In an action against a street railroad company for the death of a wagon driver who was struck by a car while driving along the car tracks after dark, instructions on the degree of care to be exercised in operating interurban cars over public streets held not to state defendant's duty toward decedent too broadly, notwithstanding limitations placed on the brilliancy of the headlights on interurban cars by city ordinance. p. 22.

21. **NEGLIGENCE.—Wrongful Death.—Action.—Instructions.—Last Clear Chance.—Pleading.**—In an action for wrongful death, instructions on the theory of last clear chance are proper under a general allegation of negligence without pleading the last clear chance doctrine where the facts developed by the evidence warrant it. p. 22.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by Nettie Senour, administratrix of the estate of Alfred Senour, deceased, against the Indianapolis and Cincinnati Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Joseph R. Morgan and *Kittinger & Diven*, for appellant.

Ayres & Ayres and *E. M. Blessing*, for appellee.

BATMAN, P. J.—This is an action by appellee against appellant to recover damages sustained by her on account of the death of her husband, Alfred Senour, alleged to have been caused by the negligence of appellant. The complaint on which the cause was tried is in two paragraphs. Appellant's demurrer to each of said paragraphs was overruled. The cause was submitted to a jury for trial, resulting in a verdict for appellee on which a judgment was duly rendered. Appellant filed a motion for a new trial, which

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was overruled, and has assigned the action of the court in overruling its demurrer to each paragraph of said complaint, and in overruling its motion for a new trial as the errors on which it relies for reversal.

Appellee contends that appellant has failed to comply with Rule 22 of the Supreme and Appellate Courts in the preparation of its brief, by fail-

1. ing to state "under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them." An examination of appellant's brief discloses that there has been a failure to some extent with reference to separate headings of each error relied on, and separately numbered propositions or points thereunder. This, however, will only have the effect of limiting our consideration to such propositions or points as are properly stated, and to those which, by their wording, clearly indicate the particular error to which they are directed. *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9; *Gwinn v. Hobbs* (1917), 72 Ind. App. —, 118 N. E. 155.

The first paragraph of the complaint alleges in substance, among other things, that appellant on December 24, 1914, was operating an interurban railroad along and over Prospect street in the city of Indianapolis, Indiana, and that said street was very narrow; that on said date and previously thereto there was a very deep snow on the ground, and appellant had scraped and plowed said snow from its tracks in said street to the sides thereof, and thereby made it practically impossible to drive a wagon thereon, except by driving upon said railroad tracks; that by reason

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of such fact it had become a custom of all vehicles going along said street to drive upon that portion thereof where said tracks were located, as appellant well knew; that on the evening of said date, while it was dark, appellee's decedent was driving east on said street in a covered grocery wagon in which he was seated; that at the same time one of appellant's cars was being run upon said street in the same direction that said wagon was going; that said car was being operated in a negligent manner, in this, that it had no headlight or light of any kind, and was being run at a high and dangerous rate of speed, to wit, twenty-five miles per hour; that while being so operated, and without warning of any kind, appellant negligently ran said car into, against and upon said wagon so being driven by said decedent, breaking and to a large extent demolishing said wagon, and thereby causing said decedent to be struck and injured by said car or by being thrown in some way so as to strike some object, fracturing his skull, and causing his death; that if appellant had had a lighted headlight upon said car its motorman would have seen the wagon in which said decedent was riding in ample time to have stopped its car and thereby prevented said injury, or to have warned said decedent in time for him to have escaped the same; that said accident happened by reason of the negligence of appellant, as aforesaid, and without any fault or negligence on the part of said decedent. The second paragraph of complaint is substantially the same as the first, except that it alleges that the striking and demolishing of the wagon by appellant's car caused the horse attached to the same to become frightened and uncontrollable, and to run away, pulling and drag-

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ging said wagon and said decedent, thereby fracturing said decedent's skull and causing his death.

Appellant presents only two objections to the complaint in its propositions or points, viz.: (1) That neither paragraph of the complaint alleges

2. that the decedent made any attempt to look for an approaching car; (2) that each paragraph of the complaint shows that the decedent was guilty of contributory negligence. The authorities cited by appellant in support of the first point stated above all involve cases which arose and were decided prior to the enactment of §362 Burns 1914, Acts 1899 p. 58. Since the enactment of said section it is not incumbent upon a plaintiff, in an action to recover damages for personal injuries, to allege his own freedom from fault, but a complaint will be good in that respect, unless the fact of contributory negligence affirmatively appears on the face of the pleading. *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612. This disposes of the first objection stated.

Appellant, in making its second objection, relies upon the allegation of the complaint which shows that the decedent voluntarily chose to drive

3. along and upon appellant's tracks while in the dark. It is well settled that the rights of a street railway company in operating its cars along a public street and of the public in traveling the same are equal, and each are bound to use ordinary care to avoid a collision. The railway company, however, has the preferential right to the portion occupied by its tracks. *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Louisville, etc., Traction Co.*

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5. v. *Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903; *Indianapolis St. R. Co. v. Bolin* (1906), 39 Ind. App. 169, 78 N. E. 210. It follows that the mere fact that appellee's decedent entered upon appellant's tracks in a wagon after dark is not negligence *per se*. Whether such conduct was or was not contributory negligence necessarily depends upon the surrounding circumstances and the attendant care used, and hence we cannot say as a matter of law that the mere fact of his entrance upon the tracks, as alleged, was contributory negligence. The court, therefore, did not err in overruling appellant's demurrer to either paragraph of the complaint.

Appellant contends that the verdict of the jury is not sustained by sufficient evidence. In support of this contention it claims that the uncontra-

6. dicted evidence shows that appellee's decedent at the time he received his injuries was driving along a public street in the dark upon its tracks, in a sparsely settled part of the city, without a tail light upon his wagon, in violation of a city ordinance in that regard. Based on these facts it asserts that the decedent was guilty of contributory negligence. We do not agree that the uncontradicted evidence shows the absence of a tail light on the wagon. One of appellee's witnesses testified that the wagon passed him a short time before the accident, and that he had a very strong impression that it had such a light, but he would not be positive. There is also evidence which tends to show that the motorman, without a headlight on the car he was operating, detected the wagon in the dark when it was from 100 to 150 feet in front of him. This would warrant an inference that it carried a tail light, which attracted the motorman's attention. Therefore there is some

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evidence that there was such a light on the wagon.

But if we could say there was no such evidence,

7. still the absence of such light, although a violation of a city ordinance, would not defeat a recovery, unless the evidence shows that such

8. negligence proximately contributed to the injury. The evidence in this regard is by no means conclusive in appellant's favor, and hence we are bound by the determination of the jury in that regard.

Appellant also asserts, in support of its contention that the verdict is not sustained by sufficient evidence,

that it will be presumed that appellee's dece-

9. dent did not look for the car which injured him, or that, if he did look, he did not heed

what he saw, in either of which events his negligence contributed to his injury. While it may be that such a presumption would exist under certain circumstances, it cannot be indulged under the facts which the evidence in this case tends to establish, viz., that appellant ran its car against the wagon in which the decedent was riding at a dangerous rate of speed, while it was dark, without any lighted headlight, and without giving any warning of its approach. There is evidence which tends to show that appellee's decedent was at a place where he had a right to be. He

was, however, required to exercise ordinary

10. care for his own safety, but in doing so he had a right to assume, in the absence of some indication to the contrary, that appellant would not fail to discharge the duty which it owed him, and within reasonable limits to govern his conduct accordingly. *Baltimore, etc., R. Co. v. Rosborough* (1907), 40 Ind. App. 14, 80 N. E. 869; *Indianapolis St. R. Co. v. Hoff-*

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man (1907), 40 Ind. App. 508, 82 N. E. 543; *Lake Erie, etc., R. Co. v. Oland* (1912), 49 Ind. App. 494, 97 N. E. 543; *Louisville, etc., Traction Co. v. Lottich*, *supra*. Under all the facts and circumstances

11. which the evidence in this case tends to establish, we cannot say as a matter of law that appellee's decedent was guilty of contributory negligence, as we would be required to do in order to sustain appellant's contention.

Appellant has challenged the action of the trial court in giving certain instructions, but appellee contends that this court cannot determine whether

12. there is reversible error in giving any of them, for the reason that appellant requested ten instructions that do not appear in the record, and which the court refused to give. She asserts that any error appearing in the instructions given may have been invited by appellant in those tendered by it, which the court refused. We recognize the rule which appellee seeks to invoke, that a party has no right to complain of an instruction given, where such party himself requested an instruction which embodied the same legal principle. *Marion Trust Co. v. Robinson* (1916), 184 Ind. 291, 110 N. E. 65. This rule has been held to apply, although the court refused to give the requested instruction by which the error was invited. *Cleveland, etc., R. Co. v. Dixon* (1912), 51 Ind. App. 658, 96 N. E. 815; *Eacock v. State* (1907), 169 Ind. 488, 82 N. E. 1039; *Orient Ins. Co. v. Kaptur* (1911), 176 Ind. 308, 95 N. E. 230.

However, none of the instructions tendered by appellant and refused by the court are in the record, and we cannot presume that any error which

13. the court may have committed in instructing

the jury was thereby invited. If appellee so believed, she could have taken the proper steps

14. to show such fact by having all the instructions tendered by appellant brought into the record, and thereby enable this court to determine whether any error committed in giving the instructions was, in fact, invited. This was incumbent upon appellee, and not upon appellant, as it was not necessary that such refused instructions be in the record in order to have a determination of the questions presented with reference to the instructions given. *Red Men's, etc., Assn. v. Rippey* (1914), 181 Ind. 455, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. (N. S.) 1006. For the reasons stated appellee's contention is not well taken.

Appellant contends that the court erred in giving instructions Nos. 4, 5, 8, 12 and 13. It asserts that

under these instructions the jury might charge

15. appellant with knowledge acquired by it after the accident. When these instructions are considered together, as we are required to do, they

16. are not reasonably susceptible of such a construction. Instruction No. 8 expressly states: "The question of reasonable care, with respect to both parties, depends wholly upon the situation then and at the time of the accident, and not upon anything known or discovered afterward, which could not with reasonable diligence have been known or discovered before the occurrence of the accident."

The failure to limit the facts and circumstances which the jury might consider in determining the question of reasonable care is urged as a fur-

17. ther objection to said instruction No. 8, but a consideration of the instructions as a whole

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discloses that the jury could not have been misled as to its duty in that regard.

It is also urged that the court erred in giving instruction No. 13, by assuming that appellee's decedent was not violating the city ordinance with

18. reference to a tail light on his wagon at the time he received his injury. This instruction is based on the duty which appellant owed the
19. general public in the operation of its cars, and, while it may be true that the evidence shows that appellee's decedent was violating said city
18. ordinance at the time he was injured, still appellant owed him the same duty which it owed the general public. Moreover, it will be observed that said instruction is not mandatory, and does not purport to cover all matters of law involving appellee's right of recovery. It was applicable to at least a portion of the evidence, and, while it might very properly have been made fuller, it was not erroneous for that reason. *Majestic Life, etc., Co. v. Tuttle* (1915), 58 Ind. App. 98, 107 N. E. 22. Other instructions informed the jury that appellee could not recover if the decedent was guilty of contributory negligence, and that in determining such question it might consider the fact of the ordinance requiring lights upon vehicles traveling on the streets after dark, and any failure on the part of the decedent to comply therewith. The law in that regard was thereby settled for the guidance of the jury, and it was unnecessary to repeat the same in other instructions which did not undertake to state all the law covering the issues. It is clear that appellant was not harmed by the action of the court in giving said instruction.

Instructions Nos. 16 and 18 relate to the degree of

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care that must be used in operating interurban cars over public streets. Appellant claims that its

20. duty toward appellee's decedent was not as broad as stated in said instructions, because of the limitations placed on the brilliancy of the headlight of interurban cars by the city ordinance introduced in evidence. This ordinance requires the headlights of such cars to be screened in such manner as to reduce the outward brilliancy at least fifty per cent. when operated on the streets of the city, but does not purport to fix the strength of such lights when so reduced. It is obvious that, notwithstanding such ordinance, the duty rests upon those operating such cars on the streets of the city to use the care stated in said instructions for the protection of vehicles thereon, which might require a reduction in the speed of such cars because of the reduction in the strength of their headlights. Appellant's objection to said instructions is not well taken.

Appellant firmly contends that the court erred in giving instruction No. 23. This instruction is on the theory of the last clear chance. The only ob-

21. jection thereto, urged by appellant in its propositions or points, is that the doctrine of the last clear chance is not pleaded, and it was therefore erroneous to instruct thereon. It has been held that a general allegation of negligence is all that is necessary in order to justify an instruction on the last clear chance doctrine, provided the facts brought out by the evidence warrants it. *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 77 N. E. 945. As to the amount of evidence necessary to justify the giving of an instruction on any particular theory, it has been held that any evidence, however slight, which presents to the jury an issue of fact, renders

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the giving of an instruction as to the law governing such facts proper. *Public Utilities Co. v. Handorf* (1916), 185 Ind. 254, 112 N. E. 775. An application of this rule to the facts which the evidence tends to prove leads us to conclude that the court did not err in giving said instruction No. 23.

We find no error in the record. Judgment affirmed.

STATE OF INDIANA, EX REL. MOCK ET AL., v. BLEEKE
ET AL.

[No. 9,142. Filed April 26, 1917. Rehearing denied October 9, 1917.
Transfer denied June 26, 1919.]

1. OFFICERS.—*Liability on Official Bonds.—Breach of Official Duty.*—Recovery cannot be had on an official bond unless a breach of an official duty is affirmatively shown. p. 26.
2. PLEADING.—*Complaint.—Theory.—Variance.*—A plaintiff cannot sue on one theory and recover on another, since any recovery must be upon the theory of the complaint. p. 26.
3. ATTORNEY AND CLIENT.—*Attorneys' Fees.—Recovery.—Complaint.—Theory.—Sufficiency.*—In an action by attorneys against a county clerk to recover fees for services for securing a judgment which was paid to the sheriff and turned over to the clerk, complaint held to be drawn on the theory of enforcing plaintiff's rights as holders of a statutory lien, so that its sufficiency must be determined regardless of any right plaintiffs may have had to demand and receive the money from the clerk for their client under §1003 Burns 1914, §968 R. S. 1881. p. 27.
4. CLERKS OF COURTS.—*Judgments.—Distribution of Proceeds.—Liability.—Attorneys' Fees.—Lien.*—The mere filing by attorneys of a declaration of intention to hold a lien for attorneys' fees on a judgment secured for a client imposed no official duty on the clerk of the court to pay the lien to them until after the validity and extent of the same had been properly determined. p. 27.

From Adams Circuit Court; *Dore B. Erwin*, Special Judge.

Action by the State of Indiana, on the relation of John Mock and another, against Ferdinand Bleeke and others. From a judgment for defendants, the relators appeal. *Affirmed.*

James T. Merryman and Mock & Mock, for appellants.

Clark J. Lutz, Simmons & Dailey and Sturgis & Stine, for appellees.

BATMAN, J.—This was an action brought by appellant against appellees, as principal and sureties on the official bond of Ferdinand Bleeke, as clerk of the Adams Circuit Court. The facts alleged in the amended complaint, in so far as they are necessary for a determination of the question on appeal, are substantially as follows: The relators and one Levi Mock, now deceased, were partners in the practice of law under the firm name of Mock and Sons. They were employed by one Thomas Faylor to institute an action against one David D. Studebaker to set aside a deed, to quiet title, and for possession and damages. Certain other persons who had an interest in said cause of action, employed other attorneys to represent them in said proceedings, but that such other attorneys did not represent the said Thomas Faylor. A single action was brought by said several attorneys, on behalf of their respective clients for the purpose stated, and was prosecuted through four trials and two appeals, resulting in a final judgment in favor of such clients for \$2,000; that, as plaintiff in said cause, the said Thomas Faylor was claiming an undivided one-fourth interest in the subject-matter of such action. The judgment, which was finally affirmed, was rendered in the Adams Circuit Court on October 30, 1909, and the said firm of Mock and Sons on November 8, 1909, filed on the margin of the order book where said judgment was entered a declaration, duly attested by the clerk, of their intention to hold a lien against said judgment for the

sum of \$2,000 for services rendered in said cause as attorneys for the plaintiffs.

On February 18, 1913, such other attorneys ordered an execution issued on said judgment, which was done, and on March 10, 1913, the sheriff paid to the appellee Ferdinand Bleeke, as clerk of the Adams Circuit Court, the sum of \$2,628.75, received by him on said judgment. On February 27, 1913, the relators served a written notice on the appellee Ferdinand Bleeke, on behalf of Thomas Faylor and fourteen other persons, reciting the fact of the recovery of such judgment, the filing of several attorneys' liens against the same, the issuing of an execution thereon, the portion of such judgment to which each of said persons was entitled, and notifying said appellee not to apply any of their shares to the payment of any liens other than the one filed by Mock and Sons, or to any one except their authorized agents or attorneys. Notwithstanding such notice, and the filing of such lien by said Mock and Sons, the said appellee Ferdinand Bleeke on March 10, 1913, without right, paid the full amount of said judgment, to wit, \$2,402.40, to such other attorneys in said action, including the one-fourth part interest of Thomas Faylor on which the said Mock and Sons had filed a lien for \$2,000. On March 19, 1913, the relators made a written demand on appellee for the payment of the one-fourth of said \$2,402.40. Said lien of Mock and Sons has never been paid, satisfied, or released, and they still hold the same as attorneys against the interest of said Thomas Faylor in said judgment, in the sum of \$2,000. That the services of said Mock and Sons for which said lien was filed are and were of the value of \$2,000. The amended complaint also contains an alleged copy of

the bond of the appellee Ferdinand Bleeke, as such clerk, to which appear the names of the remaining appellees as sureties, with a penalty in the sum of \$10,000, payable to the State of Indiana for the use of persons aggrieved, and claims that \$657, with interest thereon at six per cent. from March 19, 1913, is now due the relators as surviving partners of Mock and Sons. Prayer demanding judgment for said amount. To this complaint appellee filed a demurrer for want of facts with a memorandum specifying a number of particulars in which such complaint was insufficient. The court sustained this demurrer, and, the appellant refusing to plead further, judgment was entered that appellant take nothing by the action, and that appellees recover costs.

The sole question presented by this appeal arises on the action of the court in sustaining appellee's demurrer to the amended complaint.

This is an action on an official bond, and we are confronted at the outset with the familiar rule that no recovery can be had on such a bond unless

1. a breach of official duty is affirmatively shown.

State, ex rel. v. Galbraith (1891), 128 Ind. 501, 28 N. E. 127; 15 Ency. Pl. and Pr. 91. The memorandum accompanying the demurrer requires this court to determine whether any breach of official duty on the part of the appellee Ferdinand Bleeke, as clerk of the Adams Circuit Court, is affirmatively shown by the complaint. It is a well-settled rule

of practice that a plaintiff must recover, if at

2. all, upon the theory of his complaint. He cannot sue upon one theory and recover upon another. *Pennsylvania Co. v. Walker* (1902), 29 Ind.

App. 285, 64 N. E. 473; *McGlone v. Hauger* (1914), 56 Ind. App. 243, 104 N. E. 116.

From an inspection of the complaint we conclude that it is drawn on the theory that the relators, as statutory lienholders, had a right to demand

3. and receive from the appellee Ferdinand Bleeke, as clerk of the Adams Circuit Court, the sum of \$657 and interest thereon from March 19, 1913, on account of the money paid to him by the sheriff on the judgment in question, and that such appellee refused to make such payment after demand so to do. The sufficiency of the complaint must therefore be determined regardless of any right the relators may have had to demand and receive such money from said appellee as such clerk, on behalf of their client as provided by §1003 Burns 1914, §968 R. S. 1881. In that event they would have been seeking to collect such money of the clerk as agents of their client, but in the case presented by the complaint they were attempting to collect the same in their personal right as alleged lienholders. The difference in their rights under the circumstances stated is at once apparent, and besides in the former event the suit to recover would necessarily be brought in the name of their principal, as the real party in interest, while the only capacity in which the relators are prosecuting this action is that of lienholders. If it

be admitted that all the facts alleged in the
4. complaint are true, as the demurrer in effect admits, can it be said that they show a breach of any official duty on the part of such clerk which gives the relators a right of action? If so, what was it? Appellant contends that it was the failure of such appellee to hold \$657 of the money paid into his hands as such clerk on said judgment, and to pay over said

amount to relators, as the surviving partners of Mock and Sons, by virtue of their said lien, notice and demand. We cannot concur in this contention: The appellee Ferdinand Bleeke, as such clerk, could only apply so much of the money paid into his hands in satisfaction of the judgment in question to the relators as mere lienholders as might be actually due them. The amount due by virtue of any such lien, if anything, was wholly uncertain. The mere filing by Mock and Sons of their declaration of intention to hold a lien on the judgment did not determine the existence or the amount of the same, but left it open for adjudication or adjustment between the contracting parties. *Kimble v. Board, etc.* (1904), 32 Ind. App. 377, 66 N. E. 1023; 1 Watson, Statutory Liens §49. The act of filing such declaration of intention, in pursuance of the statute, is an unilateral proceeding, and does not assume to fix the amount due. Its only purpose is to protect the attorney rendering the service for whatever amount is actually due, as may thereafter be determined. The statute itself designates the amount to be stated in such declaration as a mere claim, and does not purport to state a determined amount. Such lien, in fact, depended on several contingencies, which the clerk had no right to determine, such as the interest represented, the terms of employment, the agreed amount to be paid for such services, or reasonable value thereof, the filing of a declaration of intention within the required time, and such other matters as might enter into its determination. Until the validity and extent of any such lien is established, no official duty rested upon the clerk to pay any part of such money to Mock and Sons, *as mere lienholders*, whatever his duty may have been to pay the same to the judgment creditor

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himself, or the attorneys of record on behalf of their principal. Appellant discusses the rights of Mock and Sons as equitable lienholders, regardless of the statute, but the same reasoning would apply, if the complaint could be construed to be drawn on that theory, and the same defect would still exist. Questions arising out of the acts of the clerk in paying the money in question to said other attorneys, as alleged in the complaint, need not be determined here, as the only liability of the clerk to the relators would arise from his failure to pay under such circumstances as made it his official duty so to do, and not from any collateral acts in the management or distribution of such fund.

We therefore conclude that the facts stated in the amended complaint do not show the breach of any official duty on the part of the principal in such bond. By what we have said we do not mean to imply that the action of the clerk in paying out all the money received on said judgment as alleged has defeated the lien of the relators for their attorney fees, or left them remediless. They may take the proper steps to have the amount of their alleged lien determined, and, when this is done, a duty will rest upon the clerk to pay the same, provided he has received the money on said judgment as alleged in the complaint. His failure so to do would then be a breach of an official duty, which would give appellants a right of action on his bond.

Other questions are raised by the demurrer to the amended complaint, which we deem it unnecessary to decide, inasmuch as there can be no reversal of the judgment for the reasons stated.

Judgment affirmed.

Galvin v. Brown—71 Ind. App. 30.

GALVIN v. BROWN.

[No. 10,451. Filed January 10, 1919. Rehearing denied May 9, 1919.
Transfer denied June 26, 1919.]

1. **APPEAL.—Right of Appeal.**—The right of appeal is wholly statutory, except where expressly secured by the Constitution. p. 32.
2. **MASTER AND SERVANT.—Workmen's Compensation Act.—Applicant's Attorney's Fee.—Right to Review.**—Under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), no appeal is authorized from an order of the Industrial Board fixing the amount of attorney's fee due applicant's attorney for services rendered in securing an award. p. 34.
3. **MASTER AND SERVANT.—Workmen's Compensation Act.—Appeal.—Dismissal.**—As an appeal to the Appellate Court from an allowance of fees for applicant's attorney is unauthorized under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), it will be dismissed, even though the question is not raised by appellee. p. 34.
4. **MASTER AND SERVANT.—Workmen's Compensation Act.—Appeals.—Decisions Reviewable.**—As §61 of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), provides for an appeal to the Appellate Court only from an award by the full board, where the record discloses an award by less than the full board, an appeal is unauthorized and must be dismissed. p. 34.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Harry C. Brown. From an order made by part of the Industrial Board, fixing the amount of attorney's fees due applicant's attorney, George W. Galvin, the latter appeals.

George W. Galvin, for appellant.

James W. Noel, Eugene Iglehart and Clinton H. Givan, for appellee.

BATMAN, P. J.—The record in this case discloses that appellee, Harry C. Brown, was an employe of Nordyke and Marmon Company; that he received a

personal injury by accident arising out of and in the course of his said employment; that he filed an application before the Industrial Board for an adjustment of his compensation because of such injury, which resulted in a final award in his favor against his employer of \$11 per week for 100 weeks beginning May 14, 1917; that afterwards appellee and his employer entered into an agreement, which was approved by the Industrial Board, whereby the latter's liability to appellee for 74 weeks of its compensation liability was redeemed by the payment of \$796.89 in a lump sum; that appellant, George W. Galvin, represented appellee as his attorney in said proceedings; that some time after the adjustment and payment of said compensation appellee filed a petition before the Industrial Board asking that it fix the attorney fee due his said attorney for the services rendered by him in said matter; that appellant entered his special appearance to said petition and filed a plea in abatement; that afterward appellee's said petition and appellant's said plea in abatement were submitted to two members of the Industrial Board, who heard the evidence and took the cause under advisement; that said two members of the board subsequently overruled appellant's plea in abatement, and made a finding of facts, and entered an order, whereby the fee of appellant for services rendered appellee in the prosecution of his said claim for compensation was fixed and approved at the sum of \$88 and appellant was ordered to return to appellee all moneys received and retained by him in excess of said sum; that appellant thereafter filed his petition for a rehearing, and asked an order setting aside and vacating the order theretofore made by the board relating to his

said attorney fee; that appellant presented his said petition in person to a single member of said board, and requested that he act thereon; and that said member, after considering said petition and being duly advised, overruled the same. Appellant is now attempting to prosecute an appeal from the order made by the two members of the board, relating to his said attorney fee. Appellee has filed a motion to dismiss the appeal on the ground that this court has no jurisdiction to hear and determine the same, because the record fails to show an award by the full Industrial Board.

In determining an appeal the question of jurisdiction is always of primary consideration. It is well settled that the right of appeal is wholly statu-

1. tory, except where expressly secured by the Constitution. *Hall v. Kincaid* (1917), 64 Ind. App. 103, 115 N. E. 361. The right of appeal under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, is not a constitutional right, but a purely statutory one. The only provision of said act which confers any authority on the Industrial Board with reference to attorney fees is found in §65, which reads as follows: "Fees of attorneys and physicians and charges of hospitals for services under this act shall be subject to the approval of the board." It is apparent that this section gives the board power to approve fees of attorneys for services rendered an employe in the prosecution of his claim for compensation, but the question arises as to whether such approval is subject to review by this court on appeal. We must look to the act itself for a determination of this question. The only section of the act conferring the right of appeal

from the action of the Industrial Board is §61, as amended by the acts of 1917. (Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918). In order to determine the scope of the right thereby conferred, we must consider it in connection with certain of the preceding sections. Section 57, as amended by the act of 1917, provides that: "If after seven days from the date of the injury or at any time in case of death, the employer and the injured employe or his dependents reach an agreement in regard to compensation under this act, a memorandum of the agreement in the form prescribed by the Industrial Board shall be filed with the board," etc. Acts 1917 p. 227, §8020o2 Burns' Supp. 1918. Section 58 provides that: "If the employer and the injured employe or his dependents fail to reach an agreement in regard to compensation under this act * * * either party may make an application to the industrial board for a hearing in regard to the matters at issue and for a ruling thereon." Section 58, *supra*, and §§59, 60, as amended by the act of 1917, *supra*, provide for the manner of such hearing, for an award in pursuance thereof, and for a review of the same when made by less than all the members thereof. Section 61, *supra*, then follows and provides that: "An award by the full board shall be conclusive and binding as to all questions of fact, *but either party to the dispute may*, within thirty days from the date of such award, appeal to the appellate court for errors of law under the same terms and conditions as govern appeals in ordinary civil actions." (Our italics).

It is quite apparent that the dispute to which reference is made in said section is the difference be-

tween the employer and injured employe, arising from a failure to agree as provided in §58, *supra*. The act nowhere makes any express provision for an appeal from an order approving or disapproving attorney fees, and we fail to find any provision from which any such right can be properly implied. Certainly a provision for an appeal from an award growing out of a disagreement between an employer and an injured employe, with reference to the latter's compensation, cannot be so construed as to imply the right of appeal in a collateral matter, based on the action of the board in approving or disapproving attorney fees, which must necessarily arise out of an express or implied contract between the injured employe and his attorney. The two matters are so far unrelated as to forbid such an implication.

We therefore conclude that there is no authority for an appeal from an order of the Industrial

3. Board approving or disapproving attorney fees. Having reached this conclusion, it is our duty to dismiss the appeal, although appellee has not raised the question in any form. *Schultz v. Alter* (1915), 60 Ind. App. 245, 110 N. E. 230.

But even if the law were otherwise with reference to the question we have been considering, we would still be compelled to dismiss this appeal on the

4. ground stated by appellee. The statute only provides for an appeal from an award by the full board. §61, Acts 1917 p. 154, *supra*. The record in this case fails to disclose any award from the full Industrial Board, and hence an appeal is unauthorized.

For the reasons stated, the appeal is dismissed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. LOCKE.

[No. 9,856. Filed June 27, 1919.]

1. **PLEADING.—Complaint.—Amending to Conform to Evidence.**—The fact that the issues are changed by an amendment of the complaint to make it conform to the evidence is no reason why the amendment should not be permitted. p. 39.
2. **CONTINUANCE.—Grounds.—Amendment to Complaint.**—In a passenger's action against a railroad company for injuries sustained by the derailment of a train, where the complaint charged that the engine and cars were defective and insufficient in certain particulars unknown to plaintiff, so that they were liable to derailment, an amendment to the complaint, made to make it conform to the evidence, alleging that one car was of unusual height and size, and was stiff and new, and was thereby liable to derailment, did not bring a new charge of negligence, its only effect being to make the complaint more specific, so that it was not error to overrule a motion for a continuance on account of the amendment. p. 39.
3. **APPEAL.—Review.—Harmless Error.—Misconduct of Counsel.**—In an action for personal injuries, statements by plaintiff's counsel, in his argument to the jury, that plaintiff should not be given a low verdict, less than he was entitled to, with the idea that defendant would not appeal, as the case would be appealed anyhow, whatever the verdict might be, were improper, and it was error for the trial court to overrule an objection thereto, but, as the effect of such statements was to increase the amount of damages assessed, and appellant, although specifying excessive damages as a ground for new trial, failed to present that question in his brief, indicating that it had no objection to the amount of the award, the error will be deemed harmless. p. 40.

From Henry Circuit Court; *Fred C. Gause*, Judge.

Action by Leslie R. Locke against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Cleveland, etc., R. Co. v. Locke—71 Ind. App. 35.

Frank L. Littleton, Forkner & Forkner and John L. Rupe, for appellant.

A. R. Feemster and John F. Robbins, for appellee.

MCMAHAN, J.—This is an action by appellee against appellant to recover for personal injuries sustained by appellee while he was a passenger on one of appellant's trains. The complaint was in two paragraphs. The first of these, after alleging that appellant owned and operated a line of railroad for the purpose of carrying passengers and freight, and that appellee became a passenger on one of appellant's trains, alleged that, while he was being carried as such passenger by appellant, the car in which he was riding became derailed, and that by reason thereof he was injured. It is charged and alleged that the portion of the track where the derailment occurred was defective; that the ties were rotten and unfit for use; that the rails were improperly laid and insecurely fastened to the ties, so that the rails were liable to spread and be pushed from their proper place, and thereby permit the train to be thrown from the track; that appellant negligently ran and operated said train along and over said defective and unsafe portion of said track at a high and dangerous rate of speed, and that, by reason of said defective and unsafe condition of the track and the operation of said train at said high rate of speed, the car in which appellee was riding was derailed, and that appellee was thereby injured, without fault or negligence on his part.

The second paragraph of complaint, before being amended as hereinafter stated, was about the same as the first, save that the negligence charged in this paragraph was in substance that the track was im-

properly and insecurely placed, laid and constructed, was defective and unfit for use in respects which plaintiff was unable to specify. That the engine and cars were defective and insufficient in certain respects to plaintiff unknown, so he could not more fully specify, and by reason thereof were unfit to be run and operated over such defective track at even a moderate rate of speed, because such train was liable at all times to be derailed, and that the defendant ran its train at a dangerous rate of speed, and, by reason of such defective condition of the track and of the engine and cars, the cars were thereby derailed, and the plaintiff was injured.

Demurrers for want of facts were filed and overruled as to each of these paragraphs. An answer of general denial being filed, the cause was submitted to a jury for trial. After appellee had introduced all his evidence, the appellant's witnesses had testified that where the derailment occurred the ties and track were in good condition; that the first car derailed was a car immediately in front of the caboose in which appellee was riding (the train being a freight train); that this car was a large, new automobile car, and empty, not belonging to appellant, but being transported by it to be loaded at a station on appellant's line; that this car was in good condition, but, being new, was stiff and liable to be derailed in going around a curve.

After all the evidence had been thus introduced as to the cause of the accident, appellee asked leave to amend his complaint by inserting therein that the track was "rough and uneven," and "that one of the cars of said train was of great and unusual height and size, and was stiff and new, and was of

such construction, proportions and dimensions as that when being run over said rough and uneven, defective, and unfit portion of said defendant's track said car was at all times liable to be caused thereby to rock and sway violently from side to side and to be thereby derailed, and was by reason thereof unfit for use in said train," and also by alleging that said accident and injury to appellee were caused by reason of said height, size, construction, proportions, dimensions, newness and stiffness of said one car of the train as aforesaid.

The court, over the objection and exception of appellant, permitted the amendments to be made for the purpose of making the complaint conform to the evidence given in the cause. An amended second paragraph of complaint was then filed, and appellant filed its verified motion for a continuance on the ground of surprise, and stating that, if a continuance was granted, it could and would produce evidence that it was not negligence to run said car in said train. This motion was overruled, and appellant filed a motion to strike out said amendments, which was also overruled, as was a demurrer for want of facts, an exception being saved by appellant to each adverse ruling. A general denial was filed to the amended second paragraph of complaint, and the trial proceeded, resulting in a verdict and judgment against appellant.

Appellant filed a motion for a new trial, the reasons therefor being that the verdict is not sustained by sufficient evidence, that it is contrary to law, that the damages awarded were excessive, that there was irregularity on the part of the court in allowing appellee to amend the second paragraph of complaint,

the overruling of the motion for a continuance, misconduct of counsel, errors in giving and refusing to give instructions, and errors in the admission and refusal to admit evidence.

The errors assigned in this court and not waived are that the court erred in permitting appellee to amend his complaint, in overruling the motion for a continuance, and in the overruling of the motion for a new trial.

Appellant contends that the court erred in permitting appellee to amend his complaint to correspond with the evidence which had been introduced

1. for the reason that such amendment changed the issues by bringing in a new charge of negligence. We do not understand that the fact
2. that the issues were changed by the amendment is a reason why the amendment should not be made. If the issues were not changed, there would be no reason for making the amendment. Indeed, we are of the opinion that the amendment was wholly unnecessary, and that its only effect was to make the allegations of the second paragraph of complaint more specific. It will be observed that the said second paragraph, before being amended, alleged that the track was "improperly and insecurely placed, laid and constructed, and defective, unsafe, and unfit for use in certain respects not more definitely known to the plaintiff, and which for this reason cannot be more fully specified and set forth; that the engine and cars of said train in which plaintiff was so riding were at that *time defective and insufficient in certain respects and particulars to the plaintiff unknown* and which, for that reason, cannot be more fully specified and set forth herein, *and that the*

same by reason thereof were unfit to be run and operated over and along said defective portion of defendant's said track, that by reason of said defective and unfit condition of said engine and cars, the plaintiff alleges that it was dangerous to run and operate said train rapidly, or even at a moderate rate of speed along and over said defective portion of said track, for that, as this plaintiff alleges, said train was liable at all times by reason thereof, when being so run and operated, to be caused thereby to be derailed and thrown from said track to the injury and damage of persons riding thereon."

There was no error in overruling the motion for a continuance, as all of the evidence could have been introduced under the allegations in the complaint prior to the amendment, and a recovery had thereon, without the amendments having been made.

The first, second and third specifications in appellant's motion for a new trial also relate to the action of the court in permitting appellee to amend the second paragraph of complaint, and in overruling appellant's motion for a continuance. Having already decided that the court committed no error in regard to these matters, we need give them no further consideration.

The next contention is that appellee's attorney was guilty of misconduct while making the closing argument to the jury. It appears that, during the

3. course of his argument, the attorney for appellee said to the jury: "Gentlemen, I don't want to get into your heads any idea of giving this man a low verdict, less than he is entitled to with the idea that this company will not appeal," and upon objection being made by appellant to the statement,

appellee's counsel repeated: "I repeat, I don't want you to get it into your heads to give this man a low verdict, less than he is entitled to, with the idea that this company will not appeal. This case will be appealed anyhow, whatever your verdict may be." Whereupon appellant objected to the statements to the jury as misconduct of counsel, and moved to withdraw the case from the jury on account thereof, whereupon the court, in the presence of the jury, said: "The objections and motion will be overruled; I think the argument is proper," to which ruling and action of the court appellant excepted.

These remarks of counsel were improper, and were rendered doubly so by the action of the trial court in approving them. The tendency of such statements, and doubtless the purpose in making them, was to induce the jury to return a verdict for a larger amount than they otherwise would do. One of the specifications in the motion for a new trial is that the damages awarded are excessive, but appellant has wholly failed to present that question, and we are therefore justified in assuming that the damages assessed are not excessive, and that appellant has no objection to the amount of the award. That being true, the statements of counsel were harmless. We do not want to be understood as approving the statements of counsel, nor as holding that such statements, when deliberately made, as they were in this case, and approved by the trial court, do not constitute such misconduct of counsel as to be reversible error. We would not hesitate to reverse this case on account of such misconduct were it not for the fact that appellant is seemingly content with the amount of the verdict. There are other remarks of counsel

which appellant contends amount to such misconduct as to be reversible error, but we think otherwise. As to misconduct of counsel see *Carter v. Carter* (1885), 101 Ind. 450; *School Town, etc. v. Shaw* (1885), 100 Ind. 268; *Rudolph v. Landwerlen* (1883), 92 Ind. 34; *Holliday & Wyon Co. v. O'Donnell* (1913), 54 Ind. App. 95, 101 N. E. 642; *Pittsburgh, etc., R. Co. v. Campbell* (1904), 116 Ill. App. 356; *L. H. & St. L. R. Co. v. Morgan* (1901), 110 Ky. 740, 62 S. W. 736; *Mount v. Commonwealth* (1905), 120 Ky. 398, 86 S. W. 707, 27 Ky. Law Rep. 788; *Louisville, etc., R. Co. v. Pointer, Admr.* (1902), 113 Ky. 952, 69 S. W. 1108, 24 Ky. Law Rep. 772; *Olfermann v. Union Depot R. Co.* (1894), 125 Mo. 408, 28 S. W. 742, 46 Am. St. 483; *Martin v. State* (1886), 63 Miss. 505, 56 Am. Rep. 812, note; *McDonald v. People* (1888), 126 Ill. 150, 18 N. E. 817, 9 Am. St. 547, note.

Complaint is made relative to the refusal of the court to give instructions Nos. 2 and 5 requested by appellant. No. 2 related to the proof required before a recovery could be had on the second paragraph of complaint, and was not applicable to such paragraph after the same was amended. No. 5 is fully covered by No. 16, given by the court.

Objection is made to instructions Nos. 2, 3, 5 and 10 as given, in that the court unduly emphasized and repeated certain rules of law, but, after a careful consideration of these instructions, we do not find them open to the objection urged against them.

No. 6 is not open to the objection urged. The objection to No. 8 is that it was error to allow the amendment to be made to the second paragraph of complaint, and that it was therefore error to give this instruction. We hold otherwise.

Complaint is made concerning certain parts of appellee's testimony, but we see no particular objection to the same. It further appears that appellant when cross-examining appellee's wife elicited the same facts from her.

We have examined the other contentions relative to the admission and exclusion of evidence, but find no reversible error. Judgment affirmed.

ALDRIDGE ET AL. v. CLASMEYER.

[No. 9,914. Filed June 27, 1919.]

1. **HUSBAND AND WIFE.—Action Against Wife.—Defense.—Coverture.—Pleading.**—The defense arising from coverture is a personal defense, and, when pleaded to an action on contract against a married woman, the plaintiff must reply facts which show that the contract sued on is one on which she is bound. p. 51.
2. **HUSBAND AND WIFE.—Joint Obligations.—Action.—Plea of Suretyship by Wife.—Reply.—Sufficiency.**—In an action against husband and wife to recover on notes executed by them in payment of the purchase price of a store, and to foreclose a mortgage securing the payment of the notes, paragraphs of plaintiff's reply to paragraphs of answer filed by the wife pleading suretyship, *held* to show sufficiently that she acquired a beneficial interest in the store by purchase, so that she would be a principal and not a surety on the notes. p. 52.
3. **APPEAL.—Review.—Harmless Error.—Overruling Demurrer.**—Error, if any, in overruling demurrer to a reply seeking to estop defendants from asserting that the wife was a surety on the notes in suit is harmless, the court having determined that the wife was in fact a principal. p. 53.
4. **APPEAL.—Briefs.—Sufficiency.—Rules of Court.**—Where appellant's brief states a number of abstract propositions of law without any specific application of the same, the brief fails to comply with the rules of court governing the preparation of briefs. p. 53.
5. **HUSBAND AND WIFE.—Joint Obligations.—Wife as Surety.—Burden of Proof.**—Where the obligation sued upon is that of husband and wife, and is secured by mortgage on real estate held

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by them as tenants by entireties, there is no presumption that the wife is surety, or that the consideration obtained was not used for the benefit of her joint estate, and the burden is upon her to allege and prove that she executed such obligation as surety and not as principal. p. 53.

6. **HUSBAND AND WIFE.—*Joint Obligations.—Relation of Wife.—Presumption.***—That the notes sued on were the joint obligations of defendants, husband and wife, and that the title to the real estate involved was held by them as tenants by entireties at the time they executed the mortgage in suit to secure the notes, would, standing alone, create a presumption that the wife was a principal on the notes, and not a surety, and, where the other facts found by the court tend to support this presumption rather than to rebut it, the presumption stands. p. 54.
7. **SALES.—*Executory Contract.—Title.—Intention of Parties.***—In an executory contract of sale the goods remain the property of the seller until the contract has been executed, and whether, in a particular case, there is an actual sale, or only an executory contract of sale, depends upon the intention of the parties. p. 55.
8. **SALES.—*Executory Contract.—Evidence.***—In an action to recover on notes given for the purchase price of a store and to foreclose a mortgage given to secure the payment of the notes, evidence held to warrant the inference that the contract of sale remained executory until the execution of the bill of sale. p. 55.
9. **APPEAL.—*Review.—Findings.—Sufficiency of Evidence.***—In determining whether the finding of facts is sustained by sufficient evidence, the court on appeal must not only consider the direct evidence most favorable to appellee, but also all reasonable inferences that the trial court was warranted in drawing therefrom, and this is true, although other and contrary inferences may be reasonably drawn from such evidence. p. 56.
10. **APPEAL.—*Briefs.—Questions Presented.—Rulings on Evidence.***—Where appellant's brief fails to show that any exceptions were reserved to the rulings of the trial court with reference to the admission and rejection of evidence, no question in that regard is presented for the determination of the court on appeal. p. 56.
11. **TRIAL.—*Venire de Novo.***—Where there was a special finding of facts and conclusions of law thereon, and the facts found are sufficient to sustain the conclusions of law in favor of plaintiff, the motion for a *venire de novo* was properly overruled. p. 57.
12. **APPEAL.—*Briefs.—Waiver of Error.***—Assigned errors are waived by a failure of appellants to make any specific reference thereto in the propositions or points in their brief. p. 57.

From Delaware Superior Court; *Everett Warner*, Special Judge.

Action by Fred W. Clasmeyer against Bert E. Aldridge and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

Frederick F. McClellan, Donald D. Hensel and Leonidas A. Guthrie, for appellants.

Pickens, Cox & Conder and Silverberg, Bracken & Gray, for appellee.

BATMAN, C. J.—This is an action by appellee against appellants, who are husband and wife, to recover a judgment on certain promissory notes, executed by each of them, and to foreclose a mortgage executed by appellants on certain real estate held by them as tenants by entireties, given to secure said notes. Appellant Mary J. Aldridge filed her separate answer to appellee's complaint in four paragraphs. The first is a general denial. The second alleges that she is the wife of her coappellant, and was such at the time of the execution of the mortgage mentioned in appellee's complaint; that at the time of the execution thereof she and her said husband owned the real estate described therein as tenants by entireties; and that she executed the same, and the notes secured thereby as surety only. The third paragraph is a plea of want of consideration. The fourth paragraph alleges that, at the time of the execution of the notes and mortgages in suit, she was, and still is, the wife of her coappellant; that said instruments were executed in consideration of a debt owing by her coappellant to appellee; that she received no part of the consideration thereof, and executed the same only as surety for her said coappellant. Appellee filed a

reply to the second, third and fourth paragraphs of said answer of appellant Mary J. Aldridge in two paragraphs. The first is a general denial, and the second alleges in substance that the notes in suit were given for the balance of the purchase price of a grocery store, purchased jointly by appellants, and that the mortgage in suit was given to secure the same. Appellant Mary J. Aldridge filed a demurrer to said second paragraph of reply, which was overruled. Appellant Bert E. Aldridge filed an answer to appellee's complaint in two paragraphs. The first is a general denial. The second is an answer to so much of appellee's complaint as seeks to foreclose the mortgage mentioned therein. It alleges in substance that, at the time of the execution of said mortgage, appellants were, and now are, husband and wife, and were on said date, and have been continuously since, the owners of the real estate described therein as tenants by entireties; that the only consideration for the notes described in said mortgage was a grocery store, which he alone purchased of appellee, and in which his coappellant had no interest; that the indebtedness evidenced by said notes is his debt; that no part of the consideration for said notes passed to his coappellant in any form; that at most she is only surety for said indebtedness, and that, by reason of such facts, the mortgage in suit is not subject to foreclosure. Appellants filed a joint paragraph of answer to appellee's complaint, which is the same in substance as the second paragraph of the separate answer of appellant Bert E. Aldridge. Appellee filed a reply to the second paragraph of the separate answer of appellant Bert E. Aldridge and the joint answer of appellants. The first paragraph is a gen-

eral denial. The second alleges in substance that appellee sold a grocery store to appellants; and that the notes and mortgage in suit were executed by them in connection with, and as part of the consideration for, their joint business. The third paragraph alleges facts by which appellee seeks to estop appellants from asserting that appellant Mary J. Aldridge is surety on the notes in suit, and from denying the validity of the mortgage given to secure the same. Appellants demurred jointly, and appellant Mary J. Aldridge demurred separately, to appellee's said third paragraph of reply, which demurrers were each overruled. Appellants filed a cross-complaint against appellee, seeking to quiet their title to the real estate in question, to which the latter filed an answer in general denial. On the issues thus formed the cause was submitted to the court for trial. On request the court made a special finding of facts and stated its conclusions of law thereon.

The facts essential to the determination of the questions hereinafter considered are as follows: That on and prior to April 1, 1915, appellee was the owner of a grocery store and meat market in Indianapolis; that appellants were husband and wife, and were living together as such on said date, and at all times hereinafter mentioned, of which fact appellee had knowledge; that on and prior to said date each of appellants were earning wages and contributing the same to their family expenses; that on said date negotiations were begun between appellee and appellant Bert E. Aldridge for the sale of said store and market, in which appellee agreed to sell the same and accept as security for the deferred payments therefor a mortgage on certain lots in Muncie, Indiana, which

appellants were purchasing, together with a chattel mortgage on the property sold; that said appellant talked to his wife about the purchase of said store and market, and informed her about the arrangements for the payment of the purchase price thereof; that on April 3, 1915, appellant Bert E. Aldridge gave appellee a check for \$200 as the first payment on said store and market, and that it was then agreed that an inventory thereof should be taken on the next day, which was Sunday, and that the deal should be closed as soon as appellants received a deed for the Muncie lots; that appellee and appellant Bert E. Aldridge, assisted by others, made an inventory of the stock in said store and market on the following day, at which time the former delivered to the latter the keys to the room in which the same were located, and it was then agreed that the deal should be closed as soon as appellants received a deed for said Muncie lots; that on April 5, 1915, appellee arranged for a transfer of the insurance policy on the stock and fixtures, and for an assignment of the lease on the room in which the same were located, to appellant Bert E. Aldridge; that thereafter appellants received deeds for said Muncie lots, in which both were named as grantees; that thereupon appellant Bert E. Aldridge called appellee by phone and informed him that the deeds had been received; that it was then agreed that appellee and appellants should meet at the law office of Pickens, Cox and Conder during the noon hour of that day to close up the transaction; that shortly after noon on April 7, 1915, the parties met at the office of said attorneys as agreed; that one of said attorneys, Mr. Conder, at appellee's request, had theretofore prepared a bill of sale from appellee to

appellants for said stock and fixtures, also the notes and mortgages in suit, also certain other notes, covering the balance of the purchase price of said stock and fixtures, and a chattel mortgage thereon, to be given by appellants to appellee to secure said last-named notes, and also an affidavit to be signed by appellee to comply with the bulk sales law; that, upon the arrival of appellants, Mr. Conder stated to them, in the presence of appellee, that he understood from what had been told him that Mrs. Aldridge was entering into the purchase of a grocery store with her husband, and that the bill of sale was to be made to them jointly; that he then read the bill of sale, real estate and chattel mortgages to appellant Mary J. Aldridge; that she stated that she did not know anything about the grocery business, and did not know how the matter would come out; that the appellants then signed the notes and mortgage in suit, the notes and chattel mortgage mentioned above, and acknowledged the execution of said mortgages before Mr. Conder as a notary public; that said notes and mortgages were thereupon delivered to appellee, who signed the bill of sale, and delivered the same to appellant Bert E. Aldridge; that said mortgages were duly recorded, and the notes secured by said chattel mortgage were paid, and said chattel mortgage duly released; that appellant Bert E. Aldridge operated said store and market for seven or eight months after April 7, 1915, during which time the money derived therefrom was deposited in his name, and used exclusively in paying the notes secured by said chattel mortgage thereon, and in paying bills incurred in operating said business, and no part thereof was used in paying the individual obligations of either of appellants; that on April 1, 1915, appellant Mary J.

Aldridge was employed by the Indianapolis Corrugating Company at a salary of \$18 per week, and prior to said date she had held a commission as notary public, and had acted as such in taking acknowledgments to various instruments; that during the time in which appellants operated said store and market they lived together as husband and wife, kept house as such, each contributing to the living expenses of said household, and during said time groceries, meats and provisions were taken from said store and market and consumed by appellants in their home; that about seven or eight months after April 1, 1915, appellant Bert E. Aldridge exchanged said store and market for certain real estate, the title to which was taken in the names of both appellants; that the consideration for the notes and mortgage in suit was a part of the purchase price of said store and market; that said notes are wholly unpaid; that appellee has been compelled to employ attorneys to collect said notes and foreclose said mortgage, and that a reasonable fee therefor is \$100; that appellants are indebted to appellee on the notes sued on in the sum of \$959.15, including interest and attorneys' fees, and that the same is secured by the mortgage in suit, which is a lien on the real estate therein described.

On the facts specially found the court stated conclusions of law, which are in effect as follows: (1) The law of the case is with appellee. (2) Appellant Mary J. Aldridge executed the promissory notes and mortgage in suit as principal, and not as surety. (3) Appellee is entitled to recover of appellants the sum of \$959.15, without relief from valuation or appraisal laws, together with the costs of this action. (4) Appellee is entitled to foreclose the mortgage in suit,

and to a sale of the real estate described therein to pay and satisfy his judgment herein. (5) Appellants are not entitled to recover on their cross-complaint.

Appellants jointly, and separately and severally, excepted to each of said conclusions of law. They afterwards filed a joint motion for a new trial, and also a separate and several motion for the same purpose. These motions are in substance the same, and were each overruled. Appellants then filed their joint and several motion for a *venire de novo*, which was overruled. They now prosecute this appeal, and have assigned errors which require a consideration of the questions hereinafter determined.

It is contended that the court erred in overruling the demurrer of appellant Mary J. Aldridge to the second paragraph of appellee's reply, ad-

1. dressed to the second and fourth paragraphs of said appellant's separate answer. This contention is based on a claim that said paragraph of reply fails to allege that the consideration mentioned therein was received by her, or was intended to be used by her for her benefit, or for her separate or joint estate. It has been held that the defense arising from coverture is a personal defense, and that when pleaded to an action on contract against a married woman, the plaintiff must reply facts which show that the contract sued on is one on which she is bound. *Arnold v. Engelman* (1885), 103 Ind. 512, 3 N. E. 238; *Dickey v. Kalsbeck* (1898), 20 Ind. 290, 50 N. E. 590. It has also been held that, where a married woman acquires a beneficial ownership in land purchased, she receives a consideration for her contract, and is a principal therein and not a surety; that where land is conveyed to a wife and her husband

jointly, the contract cannot be split into fragments to the prejudice of the vendor, but as to him all the purchasers are principals and the promise to pay indivisible. *Kedy v. Kramer* (1891), 129 Ind. 478, 28 N. E. 1121. No reason occurs to us why this principle should not be applied to contracts involving the purchase of personal property by a husband and wife.

An examination of the paragraph of reply under consideration discloses that it is alleged therein in substance that the stock of merchandise in

2. question was purchased by appellants jointly; that they executed the notes and mortgage in suit to evidence and secure the balance due on the purchase price thereof; that said stock of merchandise was sold and delivered by appellee to appellants jointly, and not to appellant Bert E. Aldridge individually; and that said notes and mortgage were executed by appellants in connection with and as part of the consideration for their joint business. True, the pleader, in one or two instances, uses the inapt expression "tenants by the entireties" in describing the title which appellants acquired in said personal property by the purchase thereof. *Abshire v. State, ex rel.* (1876), 53 Ind. 64. However, we believe that, notwithstanding such fact, the fair import of said paragraph of reply is as stated above. We therefore conclude that it alleges facts which show that appellee Mary J. Aldridge acquired a beneficial interest in said stock of merchandise by purchase. Under these circumstances she would be a principal, and not a surety, on the notes given for the purchase price thereof, in accordance with the rule stated above. We conclude that the court did not err in overruling the demurrer in question.

It is further contended that the court erred in overruling the joint demurrer of appellants to appellee's third paragraph of reply to their joint answer

3. to the complaint. It will be observed that said third paragraph of reply alleges facts by which appellee seeks to estop appellants from asserting that appellant Mary J. Aldridge is surety on the notes in suit, and from denying the validity of the mortgage given to secure the same. Inasmuch as the court determined that said appellant was in fact a principal on said notes, any error in ruling on appellants' demurrer to said third paragraph of reply would be harmless. For the same reason any error in overruling the separate demurrer of appellant Mary J. Aldridge to appellee's third paragraph of reply to her second and fourth paragraphs of answer to the complaint would be harmless.

Appellants contend that the court erred in each conclusion of law stated on the special finding of facts. In support of this contention they state

4. a number of abstract propositions of law without making any specific application of the same to the instant case. This is not a compliance with the rules governing the preparation of briefs. However, we gather from the general tenor of the propositions stated that appellants base their contention in this regard on a claim that the special finding of facts fails to show that appellant Mary J. Aldridge received all or a part of the consideration of the notes in suit, either in person or to the betterment of her joint or separate estate. The recognized rule

5. in this state is that, where the obligation sued upon is that of husband and wife, and is secured by a mortgage on the real estate held by them

as tenants by entireties, there is no presumption that the wife is surety on such obligation, or that the consideration obtained was not used for the benefit of her joint estate, and the burden is upon her to allege and prove that she executed such obligation as surety and not as principal. *Security Co. v. Arbuckle* (1889), 119 Ind. 69, 21 N. E. 469; *Jenne v. Burt* (1889), 121 Ind. 275, 22 N. E. 256; *Müller v. Shields* (1890), 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406; *Cook v. Buhr-lage* (1902), 159 Ind. 162, 64 N. E. 603. In the

6. instant case the special finding of facts shows that the notes in suit were the joint obligations of appellants, and that the title to the real estate in question was held by them as tenants by entireties at the time they executed the mortgage in suit to secure the same. These facts standing alone under the rule stated above would create a presumption that she is a principal on said notes, and not a surety. The other facts found tend to support this presumption rather than to rebut it, and hence the presumption stands.

Appellants predicate error on the action of the court in overruling their motion for a new trial. Among the reasons assigned therefor are that the decision of the court is not sustained by sufficient evidence, and is contrary to law. This requires us to consider whether the special finding of facts is sustained by sufficient evidence, and whether it is contrary to law. *Wolverton v. Wolverton* (1904), 163 Ind. 26, 71 N. E. 123. In support of this contention appellants urge with much vigor, among other things, that the evidence shows that the sale of the store and market was made to appellant Bert E. Aldridge and fully consummated by delivery, prior to the time at

which the parties met in the office of Pickens, Cox and Conder, where appellant Mary J. Aldridge executed the notes and mortgages given to evidence and secure the balance of the purchase price of said store and market; that by reason of such fact she could not have purchased an interest therein of appellee at such time, and therefore must have executed the notes and mortgage in suit as surety. In support of this contention they cite the facts that the inventory had been made, the purchase price had been determined, the keys to the storeroom had been turned over to appellant Bert E. Aldridge, and he had been operating the business prior to such meeting. While these facts were proper for the court to consider in reaching its decision, they were not conclusive against appellee.

In this connection we note that it has been held that in an executory contract of sale the goods remain the property of the seller until the contract has

7. been executed, and whether, in a particular case, there is an actual sale, or only an executory contract of sale, depends upon the intention of the parties. *Warner v. Warner* (1903), 30 Ind. App. 578, 66 N. E. 760.

It will be observed that the evidence tends to prove, as the court found, that when it was agreed to take an inventory of the stock on Sunday, and when

8. appellee delivered the keys to appellant Bert E. Aldridge, after taking such inventory, it was agreed that the deal would be closed as soon as appellants received the deeds to the Muncie lots; that when said deeds had come appellant Bert E. Aldridge called appellee by phone and informed him of that fact, and it was then agreed that appellants should meet appellee at noon on that day to close up the transaction.

These facts, when considered in connection with other facts proved, and the surrounding circumstances, are sufficient to warrant an inference that the contract of sale remained executory until the execution of the bill of sale, notes and mortgages at the office of Pickens, Cox and Conder on April 7, 1915. Moreover, the court may have drawn the inference from the facts and circumstances in evidence that, in negotiating for the purchase of the store and market, appellant Bert E. Aldridge was not only acting for himself, but also as agent for his wife, in which event it would be immaterial whether the contract of sale had been executed, or was executory, at the time the notes and mortgages were executed.

In determining whether the finding of facts is sustained by sufficient evidence, we must not only consider the direct evidence most favorable to

9. appellee, but must also consider all reasonable inferences that the trial court was warranted in drawing therefrom. *Moerecke v. Bryan* (1915), 183 Ind. 591, 108 N. E. 948. And this is true, although other and contrary inferences may be reasonably drawn from such evidence. *Toledo, etc., R. Co. v. Milner* (1916), 62 Ind. App. 208, 110 N. E. 756; *Nat. Life Ins. Co. v. Headrick* (1916), 63 Ind. App. 54, 112 N. E. 559. Guided by these rules, we are unable to say that the decision of the court is not sustained by sufficient evidence. No sufficient reason has been presented for holding that the decision of the court is contrary to law.

Appellants, in support of their motions for a new trial, finally contend that the court erred in the admission and rejection of certain evidence. How-

10. ever, a careful examination of their original brief, and the subsequent amendment thereto,

fails to disclose that any exceptions were saved to the rulings of the court with reference to such evidence. Under these circumstances no question in that regard is presented for our determination. This is in accord with the settled rule governing the preparation of briefs on appeal, as disclosed by many decisions. *American Fidelity Co. v. Indianapolis, etc., Fuel Co.* (1912), 178 Ind. 133, 98 N. E. 709; *Cleveland, etc., R. Co. v. Beard* (1913), 52 Ind. App. 105, 100 N. E. 392; *Smith, Admx., v. Cleveland, etc., R. Co.* (1918), 67 Ind. App. 397, 117 N. E. 534; *Decker v. Mahoney* (1917), 64 Ind. App. 500, 116 N. E. 57; *Chastain v. Board, etc.* (1918), 68 Ind. App. 162, 119 N. E. 1007. Other alleged errors are either expressly or impliedly waived. We conclude that the court did not err in overruling appellants' motions for a new trial.

Appellants also contend that the court erred in overruling their joint and several motion for a *venire de novo*. As there was a special finding of

11. facts in this case and conclusions of law thereon, and the facts found are sufficient to sustain the conclusions of law in favor of appellee, the
12. motion for a *venire de novo* was properly overruled. *Brehm v. Hennings* (1919), 70 Ind. App. 625, 123 N. E. 821. All other errors properly assigned have been waived by a failure of appellants to make any specific reference thereto in their propositions or points. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362.

Appellants have failed to point out any reversible error in the record, and the judgment is therefore affirmed.

ROSS v. FELTER.

[No. 9,788. Filed April 24, 1919. Rehearing denied June 27, 1919.]

1. **INJUNCTION.—Temporary Restraining Order.—Expiration.**—When a temporary restraining order is issued until a fixed date, and the party is given leave on that day to move for a temporary injunction, but no further action is taken, the temporary restraining order expires on the date fixed. p. 61.
2. **INJUNCTION.—Temporary Restraining Order.—Expiration.**—An order restraining defendant from harvesting or disposing of certain wheat until notice and further order of the court, it being ordered that defendant be notified that an application for a temporary injunction would be heard on a day named, did not fix a definite limit as to when the restraining order should expire, so that, in the absence of further action, it did not expire on any fixed date. p. 61.
3. **JUDGMENT.—Final Judgment.—What Constitutes.—Action for Injunction.**—Where, in an action for an injunction, there was a trial upon the issues, evidence was heard, and there was a general finding for defendant and plaintiff was adjudged liable for costs, such judgment was "final," so that defendant could sue on the injunction bond given by plaintiff, a judgment being final if it at once disposes of the entire controversy, settling the rights of the parties and leaving nothing for further consideration. p. 62.
4. **EVIDENCE.—Admissibility.—Transcript of Injunction Proceedings.—Action on Injunction Bond.**—Where there was final judgment in an action for an injunction, the transcript of the proceedings in that action was properly admitted in evidence in defendant's action on the injunction bond given by the plaintiff. p. 62.
5. **EVIDENCE.—Testimony as to Declarations Out of Court.—Admissibility.—Limiting to Purpose of Impeachment.**—Where there was judgment for a tenant in a landowner's action for an injunction to restrain him from harvesting and disposing of a crop of wheat, and the tenant sued on the injunction bond to recover damages, it was proper for the trial court, in admitting testimony of declarations made by the tenant as to the ownership of the wheat involved, to limit the use of such evidence to the purpose of impeachment, since, although declarations and statements of a party made out of court may be proved, not merely to impeach the party, but as substantial proof of a fact in controversy, the ownership of the wheat was determined in the injunction

proceedings, so that it was not in issue in the action on the bond.
p. 63.

6. **INJUNCTION.**—*Action on Bond.—Measure of Damages.*—In an action on an injunction bond given plaintiff tenant when enjoined from harvesting or disposing of a crop of wheat, plaintiff was entitled to recover the fair market value of the wheat when taken, personal expenses and loss of time necessarily spent in the action, together with such reasonable attorney fees as he may have incurred on account of the injunction proceedings.
p. 63.

From Howard Circuit Court; *A. B. Kirkpatrick*,
Special Judge.

Action by Wiley S. Felter against John A. Ross.
From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Kent & Ryan, Brumbaugh & Laymon and Bell,
Kirkpatrick & Voorhis, for appellant.

Wolf & Barnes and Sheridan & Gruber, for appellee.

McMAHAN, J.—This is an action for damages on an injunction bond given by Walter Stigleman, as principal, and the appellant, as surety, in an action brought by Walter Stigleman against the appellee.

The cause was tried by a jury, and resulted in a judgment being rendered against appellant in the sum of \$300. The only error assigned and not waived is that the court erred in overruling appellant's motion for a new trial.

Appellant's contentions that the verdict of the jury is not sustained by sufficient evidence and is contrary to law will be considered together. The facts are in substance as follows: On June 20, 1910, Walter Stigleman filed a complaint against the appellee in the Clinton Circuit Court, and on the same day he applied to the court for a temporary restraining order, gave the bond sued on, which was signed by

appellant as surety, and the court on said day issued a temporary restraining order, restraining the appellee until notice and further order of the court, from cutting, harvesting and disposing of certain wheat which was on a farm which said Stigleman had recently purchased, and which had been occupied by appellee as tenant.

The said order provided that the defendant, appellee, be notified that an application for a temporary injunction in said cause would be heard on June 24; this order was served on appellee the same day it was issued. No action was taken in said cause on June 24 and nothing further was done until in September, when the appellee appeared and filed his answer.

The cause was submitted to the court for trial, and in January, 1912, the court entered a judgment against the appellee, perpetually enjoining him from cutting or removing said wheat. A new trial being granted, the cause was again tried, and on this second trial the court, on June 6, 1914, made a general finding against the plaintiff in that action and in favor of appellee upon the issues presented by the pleadings, and on the same day rendered a judgment in favor of appellee for costs.

Appellant claims that the evidence shows that no injunction was granted, but that a mere temporary restraining order was granted to be and remain in force until notice thereof be given and a hearing on June 24 of an application for a temporary injunction could be had, and that by the terms of said restraining order, as well as by the law authorizing the same, it expired June 24, leaving the appellee thereafter unrestrained and free to remove and dispose of the wheat in controversy at his will and that appellee could recover only such damages as were the direct

result of the restraining order between June 20 and June 24.

We do not think that the appellant can be upheld in this contention. We agree with the appellant that, when a temporary restraining order is issued

1. until a fixed date, and the party is given leave on that day to move for a temporary injunction, and no further action is taken, the temporary restraining order expires on the date fixed. But the order under consideration did not fix a definite limit when the temporary restraining order should expire. The order read as follows: "It is ordered that the defendant be and is hereby restrained from cutting any wheat or removing the same from the following described real estate * * * until notice and further order of this court. It is further ordered that the defendant be notified that an application for a temporary injunction herein will be heard * * * on the 24th day of June 1914."

No application was made for a temporary injunction, and nothing was done except to put the cause at issue until December 11, when the cause was submitted to the court for trial. The court found the facts specially, and, after stating its conclusions of law, rendered a judgment against the appellee, wherein it was adjudged that the "temporary injunction heretofore granted, entered and issued in this cause be, and the same hereby is, made perpetual." Thus it would appear that the judge who had issued the temporary restraining order and the parties acted upon the theory that the temporary restraining order was in force and effect, and it was carried into the final judgment, although it was improperly referred to as a temporary "injunction."

If the temporary restraining order had been limited by its terms to expire June 24, instead of until further order of the court, we would have a very different proposition before us. *Terre Haute, etc., R. Co. v. St. Joseph, etc., R. Co.* (1900), 155 Ind. 27, 57 N. E. 530.

Appellant also contends that no final judgment was rendered on the second trial, that the judgment of the court that the plaintiff pay the costs is an in-

3. terlocutory and not a final judgment. We cannot agree with the appellant in this contention. There was a trial upon the issues, evidence was heard, and there was a general finding for the appellee, whereupon it was adjudged and decreed that the plaintiff in that cause pay the costs of the action. There was nothing further to do in that case. The issues were fully disposed of, and a final judgment rendered. A judgment is final if it at once disposes of the entire controversy, settling the rights of the parties, and leaving nothing for further consideration. No particular form of words is usually considered necessary to show the rendition of a judgment. *Kelley v. Augsperger* (1908), 171 Ind. 155, 85 N. E. 1004; *State, ex rel. v. Lung* (1907), 168 Ind. 553, 80 N. E. 541.

Complaint is also made because the court allowed the appellee to introduce the transcript in the case of Stigleman against the appellee in evidence.

4. From what we have heretofore said in discussing the temporary restraining order and the final judgment, it follows that the court committed no error in admitting the transcript of the proceedings in the injunction suit in evidence.

Appellant next says that the court erred in refusing to admit the answer to question No. 8 in the depo-

sition of Joseph P. Gray for the purpose of

5. showing ownership of the wheat in Walter Stigleman and in admitting and limiting such answer for the purpose of showing statements made by appellee out of court in conflict with statements made in court. The witness in his said answer stated that appellee had told him that he had sold the wheat to his father-in-law from whom Stigleman had purchased the land, and that this statement was made before Stigleman purchased the land. It is true, as appellant contends, that declarations and statements of a party made out of court may be proved, not merely to impeach the party, but as substantial proof of the fact in controversy. But the ownership of the wheat was not a matter in controversy in the case now before us. That controversy was disposed of in the injunction proceedings. There was no error in thus limiting the testimony of the witness.

Complaint is also made that the court erred in giving instructions Nos. 3, 4 and 5, tendered by appellee, and in refusing to give No. 5, tendered by appellant. The objection made to Nos. 3 and 4 is that there was no final judgment in the injunction proceedings. We have held otherwise. These instructions were not objectionable.

Instruction No. 5 related to the measure of damages, and told the jury that, in case they found for the appellee, he was entitled to recover the

6. fair market value of the wheat when taken, personal expenses and loss of time necessarily spent in the action, together with such reasonable attorney fees as he may have incurred on account of the injunction proceedings. This is a correct statement of the law.

Wood v. Isgrigg Lumber Co.—71 Ind. App. 64.

Instruction No. 5 tendered by appellant asked that the jury be instructed that the judgment rendered in the injunction proceedings was not a final judgment. We have held otherwise. There was no error in refusing this instruction.

Appellant also contends that the amount of the verdict is excessive, but that contention is also based on the theory that there was no final judgment in the injunction proceedings, and that there could be no recovery for that reason.

There was no error in overruling the motion for a new trial. Judgment affirmed.

WOOD ET AL. v. ISGRIGG LUMBER COMPANY ET AL.

[No. 9,891. Filed June 19, 1919. Rehearing denied June 27, 1919.]

1. **MECHANICS' LIENS.**—*Right to Lien.*—*Corporations.*—*Statutes.*—*"Persons."*—Under §8295 Burns 1914, Acts 1911 p. 62, providing that "all persons performing labor or furnishing materials, etc.," may have a mechanic's lien, a corporation may acquire a lien for materials. p. 65.
2. **MECHANICS' LIENS.**—*Materialmen.*—*Submaterialmen.*—*Right to Lien.*—A dealer or materialman who furnishes material to another materialman has no right to a mechanic's lien on the property improved. p. 68.
3. **MECHANICS' LIENS.**—*Materialmen.*—*Right to Lien.*—Where a materialman furnished materials to a person who had a contract to construct the house in which they were to be used and who was engaged exclusively in the general contracting business, the materialman had a right to a mechanic's lien, as such person was a contractor and not a materialman. p. 68.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by the Isgrigg Lumber Company and others against John J. Wood and wife and Harvey R. Cox.

Wood v. Isgrigg Lumber Co.—71 Ind. App. 64.

From the judgment rendered, defendants John J. Wood and wife appeal. *Affirmed.*

Frank S. Roby and Little & Little, for appellants.

Edgar A. Brown, George R. Harvey and Groninger, Groninger & Groninger, for appellees.

McMAHAN, J.—This is a consolidated action for the foreclosure of mechanics' liens by the Isgrigg Lumber Company, the Practical Cement Block Company and the Indianapolis Mortar and Fuel Company, corporations, against certain real estate in the city of Indianapolis owned by the appellants, who are husband and wife. Appellee Cox, who was named as a defendant, filed a cross-complaint. The issues were closed by general denials. The cause was tried by the court, and on request the facts were found specially, and conclusions of law stated thereon in favor of the appellees other than Cox. Decrees were rendered in favor of said appellees foreclosing their respective liens. Appellants excepted to the several conclusions of law. The errors assigned and relied on for reversal are that the court erred in each of its conclusions of law.

• Appellants first contend that the statute does not give the right of acquiring a mechanic's lien to a corporation. Section 8295 Burns 1914, Acts

1. 1911 p. 62, provides that "all persons performing labor or furnishing materials," etc., may have a lien on the real estate belonging to the owners to the extent of any labor or materials furnished. It is appellants' contention that our statute provides for a lien in favor of any "person," and not in favor of a corporation, and that a corporation cannot acquire a lien under our statute.

In Endlich, Interpretation of Statutes, §§87, 89, it is said: "In its legal significance it is said the word 'person' is a generic term and as such, *prima facie*, includes artificial as well as natural persons, unless the language indicates that it is used in a more restricted sense. * * * If any general rule can be drawn from the decision, it would seem to be this, that, where the act imposes a duty towards, or for the protection of, the public or individuals, grants a right properly common to all, and from participation in which the limited character of corporate franchises and the absence of any natural rights in corporations do not, by any policy of the law, debar them, the term 'persons' will, in general include them, whether the act be a penal or a remedial one."

Section 1356 Burns 1914, §1285 R. S. 1881, provides, among other things, that the word "person" extends to bodies politic and corporate.

In 27 Cyc 24, in an article on "Who May Acquire Liens," the following language is used: "The statutes generally provide that any person who furnishes material or does work shall have a lien, and this is construed to mean either a natural or an artificial person. Thus the lien may be acquired by a partnership, or a corporation."

Rockel, Mechanics' Liens, §45a, in discussing the Mechanics' Lien Law of this state, says: "The words 'All persons' * * * would seem to be broad enough to include every individual or corporation that would bring itself within the statute."

1 Watson, Indiana Statutory Liens, §884, says: "Person, as used in the statute, includes artificial as well as natural. An individual, a partnership or a corporation, otherwise entitled thereto, may acquire

the lien, * * *. The word 'person' includes a corporation; that a corporation is entitled to a lien is shown by a number of Indiana cases."

In *Tennis Bros. Co. v. Wetzel, etc., R. Co.* (1905), 140 Fed. 193, it was held under the statute of West Virginia, which gave a lien to every workman, laborer, or other person who shall do or perform any work or labor, that the word "person" included a corporation. See, also, *Doane v. Clinton* (1875), 2 Utah 417; *Dalles Lumber, etc., Co. v. Wasco, etc., Mfg. Co.* (1869), 3 Ore. 527; *Louden v. Coleman* (1877), 59 Ga. 653; *Fagan & Osgood v. Boyle Ice Mach. Co.* (1886), 65 Tex. 324; *Gaskell v. Beard* (1890), 58 Hun 101, 11 N. Y. Supp. 399. • As said by the court in *Gaskell v. Beard, supra*: "A corporation is as completely within this intention of the section as a natural person would be, and is equally entitled to its protection. For, as a matter of justice, no distinction can possibly exist between the merits of a claim for materials furnished by a corporation or an individual, but each is entitled to be equally supported and each may be fairly assumed to be a person within the intention of the act."

Corporations can furnish materials the same as individuals, and we know of no reason why they are not entitled to have a lien for materials furnished the same as an individual. Every reason and argument in favor of giving a natural person such a lien applies with equal force to a corporation. We hold that under the Mechanics' Lien Law of this state a corporation may acquire a lien for materials.

The appellants also contend that the appellees in whose favor the liens were foreclosed were not mate-

rialmen, for the reason that the materials were

2. furnished by them to appellee Cox, who, appellants say, was a materialman. In other words, they say that a dealer or materialman
3. who furnishes material to another materialman has no right to a mechanic's lien on the property improved. This is a correct statement of the law. *Rudolph Hegener Co. v. Frost* (1915), 60 Ind. App. 108, 108 N. E. 16. But in the case at bar the materials were furnished to appellee Cox, who had the contract to construct the house for which the materials were furnished and in which they were used. Appellee Cox was a general contractor, who had no other business than taking contracts for the erection of houses and other similar buildings, and was in no sense a materialman.

A contractor has been defined as a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control with respect to all the petty details of the work. *Halstead v. Stahl* (1911), 47 Ind. App. 600, 94 N. E. 1056; *Carey, etc., Lumber Co. v. Jones* (1900), 187 Ill. 203, 58 N. E. 347.

Appellants also contend that the notices of intention to hold liens given by appellees were not sufficient. There is, however, no merit in this contention.

Judgment affirmed.

Haskell, etc., Car Co. v. Logermann, Admx.—71 Ind. App. 69.

HASKELL AND BARKER CAR COMPANY v. LOGERMANN,
ADMINISTRATRIX.

[No. 9,915. Filed June 27, 1919.]

1. **APPEAL.—Review.—Ruling on Motion to Make Complaint More Specific.**—In an action for wrongful death, where each paragraph of the complaint, when considered as an entirety, so definitely pleaded defendant's negligence that the precise nature of the charge could not be misunderstood, there was no reversible error in overruling defendant's motion to make the complaint more specific. p. 72.
2. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Complaint.—Sufficiency.**—In an action against the master for the death of a servant due to the alleged negligent operation of a wood-working machine, complaint under the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), held sufficient as against demurrer for want of facts. p. 73.
3. **DEATH.—Wrongful Death Recovery.—Common Law.—Statute.**—At common law there could be no recovery for death by wrongful act, but such an action is authorized by §285 Burns 1914, Acts 1899 p. 405. p. 74.
4. **DEATH.—Actions.—Right of Action.—Release from Decedent.**—An action by a personal representative under §285 Burns 1914, Acts 1899 p. 405, for the wrongful death of his decedent, will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death. p. 75.
5. **INSANE PERSONS.—Release for Personal Injuries.—Validity.—Absence of Judicial Determination.**—A contract of settlement for personal injuries made by an employer with a servant of unsound mind, but who has not been judicially so determined, is voidable only. p. 75.
6. **DEATH.—Wrongful Death.—Actions.—Release by Injured Insane Person.—Right of Action by Personal Representative.**—Where an injured servant while of unsound mind entered into a contract of settlement with his employer he had, at the time of his death, a right of action for his injuries which could have been maintained through his guardian, since the settlement was voidable, and after his death from such injuries his legal representative could prosecute an action under §285 Burns 1914, Acts 1899 p. 405, authorizing a recovery for wrongful death. p. 75.
7. **TENDER.—Validity.—Voidable Contract.—Administrator's Right of Disaffirmance.**—A valid tender may be made by an adminis-

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trator of a decedent's estate when necessary to disaffirm a contract entered into by decedent in his lifetime. p. 75.

8. **DEATH.**—*Death by Wrongful Act.*—*Release from Decedent.*—*Disaffirmance.*—Where an injured servant entered into a contract of settlement with an employer for injuries which later resulted in his death, it will be presumed, in the absence of a showing to the contrary, that, if the administratrix of his estate took money from its assets to make a tender on disaffirming such contract, she acted in compliance with an order of court, and, if she acted without such an order, the presumption will be that as the legal representative in the settlement of the estate she had given a sufficient bond to protect the estate's interest, so that the employer in no event is in a position to complain. p. 75.
9. **EVIDENCE.**—*Action for Wrongful Death.*—*Conversations not Part of Res Gestae.*—*Admissibility.*—In an action under the Employers' Liability Act (Acts 1911 p. 145, §8020a et seq. Burns 1914), for the wrongful death of a servant, testimony by one of employer's two servants who had charge of the machine which injured decedent, detailing a conversation between himself and his coemploye and assistant after the accident tending to show the negligent operation of the machine, was inadmissible, since the conversation was not part of the *res gestae*. p. 76.
10. **APPEAL.**—*Review.*—*Harmless Error.*—*Refusal of Instructions.*—The trial court's refusal of requested instructions is not reversible error where such instructions are fully covered by others given by the court on its own motion. p. 77.

From Laporte Circuit Court; *James F. Gallaher*, Judge.

Action by Emma Logermann, administratrix of the estate of John Logermann, deceased, against the Haskell and Barker Car Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William A. McVey, Howard B. McLane, Jeremiah B. Collins and Cornelius R. Collins, for appellant.

Andrew J. Hickey, Norman F. Wolfe and Robert H. Moore, for appellee.

REMY, J.—This is an action for damages for the death of appellee's decedent caused by the alleged negligence of appellant company, and is brought

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under the Employers Liability Act. Acts 1911 p. 145, §8020a *et seq.* Burns 1914. The complaint is in two paragraphs. The allegations of the first paragraph, in so far as is necessary to a proper determination of the questions raised in reference thereto, are in substance as follows: On June 8, 1913, plaintiff's decedent, John Logermann, was in the employ of defendant company, a corporation, in its freight car factory as a laborer; that, at the time, defendant had in its employ in its said factory about 3,000 men; that located in its said factory building was a machine used for cutting tenons in pieces of wood to be used for rafters in making roofs for cars; that attached to said machine were revolving knives which cut such tenons; that said knives were turned by electric power, and could be, and were, raised and lowered by the operator of the machine as it became necessary in doing the work; that said knives when in motion moved with such great force that pieces of timber which were being cut by the revolving knives had to be placed into the machine and fastened with set screws to prevent them from being caught and thrown from the machine by the movement of the revolving knives, and that it was the duty of defendant's employes operating the machine so to fasten the pieces of timber; that at said time plaintiff's decedent was in the course of his employment, and pursuant to immediate orders of the foreman of defendant company, to whose orders he was bound to conform, and did conform, carrying boards to said machine, there to be worked up; that while he was so carrying said boards, and without any fault or negligence on his part, a piece of timber was caught by the revolving knives and thrown with great force against said decedent, striking him between the hips and shoulders,

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and severely injuring him, all because and as a result of the negligence of defendant's employes who in the line of their employment had charge of and were operating said machine, in this, that they had negligently sought to cut tenons in the piece of timber without first securely fastening the same with the set screws provided for that purpose; that as a result of his injuries the nervous system of plaintiff's decedent was completely shattered, his spine injured, his mind affected, etc., resulting in his death; that decedent left surviving him his widow and four children. The second paragraph is identical with the first, excepting that the second paragraph charges that, through the negligence of defendant's said employes who were operating the machine, a large pile of wood was permitted to accumulate around the machine, thus preventing the said set screws, which, as aforesaid, were provided to hold said pieces of timber in place, from serving the purpose for which they were intended, and as a result the piece of timber was not securely fastened, was caught by the revolving knives, and thrown with great force, etc.

The first error assigned and presented by appellant is that the court erred in overruling appellant's motion to make each paragraph of the com-

1. plaint more specific. When each paragraph is read as an entirety, it is clear that the facts constituting appellant's negligence are so definitely pleaded in each paragraph that the precise nature of the charge cannot be misunderstood. There was no reversible error in overruling appellant's motion to make the complaint more specific. *Jackson Hill Coal Co. v. Van Hentenryck* (1918), 69 Ind. App. 142, 120 N. E. 664; *Board, etc. v. State, ex rel.* (1913), 179 Ind. 644, 102 N. E. 97.

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It is urged that neither paragraph of complaint states facts sufficient to state a cause of action, and, in its memorandum filed, appellant set forth

2. many reasons therefor. Under the rule laid down in the case of *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, and which has since been followed by the courts of appeal in this state, we are of the opinion that each paragraph of complaint stated a good cause of action. Each paragraph is sufficient to apprise a person of ordinary understanding of what he would be required to meet. *Kahle v. Crown Oil Co.* (1913), 180 Ind. 131, 100 N. E. 681; *Shirley Hill Coal Co. v. Moore* (1914), 181 Ind. 513, 103 N. E. 802; *Inland Steel Co. v. Gillespie* (1914), 181 Ind. 633, 104 N. E. 76.

In addition to its answer in denial, appellant company filed two affirmative answers, each setting forth that appellee's decedent in his lifetime had, in consideration of ten dollars paid to him by appellant, released appellant company from all claims growing out of his injuries which in the complaint it is alleged caused his death. To these affirmative answers, appellee filed a reply in denial; also, what is denominated her amended second paragraph of reply, alleging that, at the time her decedent executed the release and made settlement of his claim, he was, and at all times thereafter until his death continued to be, a person of unsound mind and incapable of transacting ordinary business affairs; and that after her appointment as administratrix of the estate of the decedent, and immediately upon learning of the pretended contract, she as such administratrix, on December 9, 1915, on behalf of the estate notified

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appellant company of the disaffirmance of the contract and release, and tendered to appellant ten dollars in gold, the total amount alleged in appellant's said reply to have been received by her decedent. A demurrer to this reply for want of sufficient facts was overruled, and this action of the court is assigned as error.

Appellant contends that the demurrer to the reply should have been sustained: (1) Because the pleading shows that decedent in his lifetime had

3. settled the claim growing out of the accident, and that there was therefore no right of action and no warrant in law or in fact to make the tender; and (2) because the facts set forth in the reply show that the tender was made by appellee as administratrix, and not as the representative of the dependents under the statute. At common law there could be no recovery for death by wrongful act. The statute of this state authorizing an action of this character (§285 Burns 1914, Acts 1899 p. 405) is as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

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An action by a personal representative for

4. the wrongful death of his decedent will be barred, if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death. *Miller v. Kelly Coal Co.* (1909), 239 Ill. 626, 88 N. E. 196, 130 Am. St. 245; *Strode v. St. Louis Transit Co.* (1906), 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084. See, also, *Hecht v. Ohio, etc., R. Co.* (1892), 132 Ind. 507, 32 N. E. 302; *Golding v. Town of Knox* (1914), 56 Ind. App. 149, 104 N. E. 978.

5. However, such a contract of settlement made with a person of unsound mind, but who has not been judicially so determined, is voidable only. See *Missouri, etc., R. Co. v. Brantley* (1901), 26 Tex. Civ. App. 11, 62 S. W. 94; *British Columbia Elec. R. Co. v. Turner* (1914), 49 Can. S. C. Rep. 470. Appellee's

decedent, therefore, at the time of his death,

6. if the allegations of the reply are true, had a right of action which through a guardian could have been maintained. It follows that after

7. decedent's death his legal representative could prosecute an action under the above statute.

That a valid tender may be made by an administrator of a decedent's estate, has frequently been decided by the courts. *Sharp v. Garesche* (1901), 90 Mo. App.

233. If it was necessary to disaffirm the contract made with decedent in his lifetime, the per-

8. sonal representative was the only one who, under the law, could have made the required tender. If the administratrix took money belonging to the assets of the estate, and on behalf of the estate made the tender, it will be presumed, in the absence of a showing to the contrary, that she acted in compliance with an order of the court. However, if she

had made the tender without an order of the court, it will be presumed that as the legal representative in the settlement of the decedent's estate she had given a sufficient bond to protect the estate's interests. In no event is appellant in a position to complain. It could make no difference to it whether the money came from the administratrix as trustee for decedent's widow and children, or from the personal estate.

The remaining error for our consideration is the court's action in overruling the motion for a new trial, the cause having been tried by a jury,

9. resulting in a verdict for appellee in the sum of \$3,000. Chief among the reasons urged for a new trial is the alleged error of the court in admitting certain evidence. Witness Werdin, after testifying that he was one of the two employes of appellant who had charge of the machine described in the complaint at the time decedent was alleged to have been injured, was permitted, over appellant's objection, to detail a conversation between himself and his coemploye, who was at the time assisting in the operation of the machine, which conversation tended to prove that appellee's decedent was severely injured, and also tended to prove that the machine was operated in a negligent manner. The conversation admitted in evidence took place after the accident, and was not a part of the *res gestae*. It is argued by appellee's counsel that since the act of 1911, *supra*, under which this action is brought, made the employer liable for the injuries caused by the negligence of the witness and his coemploye with whom the conversation was had, therefore the statements by them were competent. Such is not the law. The conversations or dec-

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larations of employes which were not a part of the *res gestae* are not competent evidence, and the admission of the testimony complained of was reversible error.

Error is predicated on the refusal of the court to give certain instructions tendered by appellant. The instructions tendered which were competent

10. were fairly covered by other instructions given by the court on its own motion. There was no reversible error in the court's refusal to give the instructions or any of them.

Other alleged errors are presented, but, since the cause must be reversed, it is not necessary to consider them. We have carefully examined the evidence, and from such examination we cannot say that the correct result was reached, and that the admission of the testimony above referred to was harmless.

Judgment reversed, with instructions to grant a new trial.

ROOT DRY GOODS COMPANY v. GIBSON ET AL.

[No. 10,493. Filed April 25, 1919. Rehearing denied June 27, 1919.]

MASTER AND SERVANT.—*Workmen's Compensation Act.—Award.—Review by Full Board.—Award by Majority.—Validity.*—In a proceeding for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), providing that where an award is made by fewer than all the members of the Industrial Board, the party dissatisfied may, by making application within seven days, have a hearing "before the full board," and that an "award of the full board shall be conclusive and binding as to all questions of fact, but that either party to the dispute may within thirty days from the date of the award appeal to the Appellate Court for errors of law," where an award of compensation was made by one member of the board

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and the employer obtained a hearing by the full board, an award after such hearing made and signed by only a majority of the board is valid and binding.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by H. Claire Gibson and others against the Root Dry Goods Company. From an award for applicant, the defendant appeals. *Affirmed.*

Charles S. Batt, Walter S. Damer and Paul G. Henderson, for appellant.

Miller & Kelley and F. S. Hamilton, for appellees.

REMY, J.—The findings of the Industrial Board which are material in determining the questions presented in this appeal are: That on February 15, 1918, appellant company was, and prior thereto had been, engaged in the conduct of a department store; that one Samuel H. Gibson was in the employment of appellant as a salesman, his work consisting chiefly in selling pianos and other musical instruments outside of the store, his only compensation being a specified commission on sales made by him, which commissions during the time of his employment averaged \$18.53 per week; that under his employment he was subject to the direction of appellant, and was required, when requested so to do, to work inside the store; that on February 15, 1918, he was directed by appellant to take charge of the music department while the representative in charge of that department went to lunch, and by that representative was directed to remain in the store during the afternoon of that day; that, while in the store in compliance with such directions, a call came from another

department to lower an elevator, which at times had been used by employes for the moving of merchandise from one floor of the store to another; that, in response to the call, Gibson reached in to the controller of the elevator, started it, and in doing so was accidentally caught by the elevator as it was descending, and was killed. It is further found by the board that the death of said Gibson was not due to intentional self-inflicted injury, and was not due to his use of intoxicants, to wilful misconduct, nor to his refusal to use safety appliances. On this finding the board awarded his dependents, the appellees herein, compensation for 300 weeks, at the rate of \$10.19 per week, and ordered that appellant pay burial expenses, not exceeding \$100.

Under proper assignments of error, appellant urges: (1) The insufficiency of the evidence to sustain the finding of the Industrial Board; and (2) that the award of the board is not valid, because made by but two members thereof.

Keeping in mind the rules of law governing this court in passing upon the evidence in cases of this character (*Haskell, etc., Car Co. v. Brown* [1918], 67 Ind. App. 178, 117 N. E. 555), we have carefully examined the evidence, and find that there is some competent evidence to support each ultimate fact upon which the award is based.

Section 59 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, as amended by the act of 1917 (Acts 1917 p. 154, §8020q2 Burns' Supp. 1918), provides that the board, by any or all of its members, may hear and determine applications for compensation, and make awards. Section 60 of said act provides that, where an award is made

by fewer than all the members of the board, the party dissatisfied, if he make application within seven days, may have a hearing "before the full board." Section 61 of the act contains the provision that an "award of the full board shall be conclusive and binding as to all questions of fact, but that either party to the dispute may within thirty days from the date of the award appeal to the Appellate Court for errors of law." The record shows that in the case at bar the evidence was first heard, and the award made, by one of the three members of the Industrial Board; that upon application duly filed a later hearing was held before the full board, resulting in the finding and award from which this appeal is taken, which finding and award is signed by but two members of the board. It is the contention of appellant that the statute does not authorize a finding and award except by the full board, and that an award made and signed by only a majority of the board has no binding force. In this appellant is in error. The statute does provide that the hearing shall be before the full board, and the record shows that the hearing was so held. The statute does not provide that all members of the board must concur in a finding and award. If a hearing is before the full board, an award made and concurred in by a majority thereof is valid.

There is no reversible error. Judgment affirmed.

FIRST NATIONAL BANK OF SOUTH BEND v. MAYR ET AL.

[No. 9,913. Transferred to Supreme Court June 27, 1919.]

1. **PRINCIPAL AND SURETY.**—*Release of Surety.*—*Common-Law Rule.*—*Technical Release.*—At common law a release of one surety releases all the sureties, but the instrument relied upon to have this effect must be an instrument under seal, and, if not under seal, it is construed as a covenant “not to sue,” which is personal to the parties thereto, and operates as a release of the party to whom given, but not of a cosurety. p. 88.
2. **COURTS.**—*Appellate Court.*—*Decisions of Supreme Court.*—*Conclusiveness.*—A decision of the Supreme Court is binding upon the Appellate Court until overruled. p. 101.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by the First National Bank of South Bend against Frank Mayr, Junior, and others. From a judgment for defendants, the plaintiff appeals. *Transferred to Supreme Court.*

Arthur L. Hubbard and *Samuel B. Pettingill*, for appellant.

Graham & Crane and *Cyrus E. Pattee*, for appellees.

ENLOE, J.—This was an action begun by appellant against the appellees, Frank Mayr, Jr., John D. Beitner, Cyrus E. Pattee, E. E. Ash and Frank L. Krug, based upon a certain “letter of credit” agreement, executed February 24, 1914, signed by the appellees, and also signed by G. W. Blair, R. G. Page, F. G. Eberhart, J. Winter, George H. Mayr and C. C. Tiedeman.

The said agreement was as follows:

“Memorandum of Agreement between the First National Bank of South Bend, Indiana, of the first part and the other persons who shall sign this agreement.

“The modern Specialties Manufacturing Company of South Bend, Indiana, desires to borrow not to exceed Fifteen Thousand Dollars (\$15,000.00) of the First National Bank of South Bend, Indiana, and to execute its note or notes therefor at such times and rates as may be agreed upon. Now, In Consideration of any such loan or loans, the undersigned agree with said bank and each other to pay all such loans as shall be evidenced by the promissory note or notes of the Modern Specialties Manufacturing Company executed by its President or Treasurer, and the undersigned as sureties for said Modern Specialties Manufacturing Company do hereby jointly and severally agree to and with said First National Bank to pay all such notes for loans when the same shall become due according to the terms thereof, without relief from valuation or appraisement laws and with all attorney’s fees incurred in the enforcement of this contract, and waive presentment for payment, protest and notice of protest and nonpayment of such notes, and that the receipt of interest in advance shall not discharge any of such sureties.

“This shall be a continuing Agreement to secure to said bank the repayment of not to exceed the total loan of \$15,000 whenever and in whatever sums made, and all renewals thereof until fully paid.

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“Witness our hands this 24th day of February, 1914.

“C. E. Pattee,
G. W. Blair,
J. D. Beitner,
Frank Mayr, Jr.,
Geo. H. Mayr,
C. C. Tiedeman,

E. E. Ash,
Frank L. Krug,
J. Winter,
F. G. Eberhart,
R. G. Page.”

The questions involved in this appeal relate to the action of the court in sustaining separate and several demurrers of appellees to the fourth paragraph of appellant's complaint; the first, second and third paragraphs of complaint having been dismissed before judgment.

This paragraph of complaint, omitting formal parts, was as follows: “Plaintiff for a fourth and further paragraph of complaint alleges and says: That plaintiff is a corporation chartered and organized under the laws of the United States of America, and is engaged in the business of a national bank in the City of South Bend, Indiana. That defendant, Modern Specialties Manufacturing Company, is a corporation organized under the laws of the State of Indiana.

“That heretofore on the 24th day of February, 1914, plaintiff entered into a written contract with defendants, Frank Mayr, Jr., John Beitner, Cyrus E. Pattee, E. E. Ash, Frank L. Krug, together with F. G. Eberhart, George W. Blair, R. G. Page and others, whereby in consideration of loans to be made by plaintiff to defendant company, not exceeding in the aggregate Fifteen Thousand Dollars (\$15,000.00) said individual defendants promised and agreed, jointly and severally, to pay plaintiff said loans when the

same should become due, a copy of which contract is filed herewith, marked Exhibit A, and made a part of this complaint. That on said day and ever since then, each of said individual defendants was and is a stockholder, but were not the only stockholders in defendant Modern Specialties Manufacturing Company.

“That thereafter, and at various times, in pursuance with and in consideration of the covenants and agreements in said contract contained, plaintiff loaned defendant company divers sums of money, not, however exceeding Fifteen Thousand Dollars (\$15,000.00) in evidence of which said loans defendant company executed, by and through its President or Treasurer, its certain promissory notes and renewals thereof, payable to plaintiff.

“That on May 20, 1916, there was due and owing to plaintiff from the defendant company, as evidenced by its said promissory notes, the sum of Twelve Thousand Four Hundred Eighty and 77/100 Dollars (\$12,480.77). That on said day F. G. Eberhart, for and in behalf of himself and R. G. Page and George W. Blair, paid plaintiff the sum of Ten Thousand One Hundred Fifty-four and 31/100 Dollars (\$10,154.31) to apply on, and which plaintiff did apply and receipt on the indebtedness of Twelve Thousand Four Hundred Eighty and 77/100 Dollars (\$12,480.77) then due plaintiff from defendant company. That in consideration of said payment plaintiff executed and delivered to said F. G. Eberhart a certain written instrument in writing, a copy of which is filed herewith, marked Exhibit E, and made part of this complaint.

“That since May 20, 1916, plaintiff has not loaned

defendant company any further sums of money. That on May 20, 1916, defendant company was and now is insolvent. That on May 20, 1916, each of said individual defendants was and now is a resident of the State of Indiana.

“That on said day each of said individual defendants was and now is solvent, and has assets in this State subject to execution under the laws of this state, over and above his liabilities, in a sum sufficient to pay the balance of _____ on said day remaining due and owing by defendant company to plaintiff, together with attorney’s fees and interest to date.

“That there is now due and owing plaintiff by defendant company the sum of Two Thousand Two Hundred Sixty-nine Dollars and Two cents (\$2,269.02), together with interest and attorney’s fees, as evidenced by the promissory notes of the defendant company and endorsements thereon, copies of which said notes and endorsements are filed herewith, marked Exhibits B, C, and D, and made a part of this complaint.

“That on the — day of _____, 1916, plaintiff demanded of each of said defendants the payment of said notes and of the full amount thereon due, and that each of said defendants failed and refused to pay the same.

“That a reasonable fee for plaintiff’s attorneys herein is Two Hundred and Fifty Dollars (\$250.00).

“Wherefore plaintiff sues etc.”

To this complaint the above agreement sued on was attached as exhibit A. Copies of said notes mentioned in said complaint were also attached as ex-

hibits to said complaint and marked exhibits B, C, and D. Exhibit E to said complaint was as follows:

“Re: Modern Specialties Mfg. Co.,
“South Bend, Ind., May 17, 1916.

“Mr. F. G. Eberhart,
“Mishawaka, Ind.

“Dear Sir: For and in consideration of the sum of \$10,000.00, Ten Thousand Dollars, paid to us, and of the acquiescence therein of those of your creditors for whose benefit substantially all your remaining assets are being transferred to the Continental and Commercial Trust and Savings Bank, as Trustees,—

“We hereby consent to such transfer and agree that neither we nor any assignee of any of our claims against you, will take any action which will have the effect of setting aside or invalidating the transfer to said Trustee.

“In consideration of the above payment we also release and discharge you, R. G. Page and G. W. Blair, from any and all liabilities in connection with the indebtedness of the Modern Specialties Mfg. Co.

“Very truly yours,
“First National Bank of South Bend,
“By Chas. L. Zigler, Cashier.
“South Bend National Bank,
“By Myron Campbell, Cashier.”

To this paragraph of complaint the appellees separately and severally demurred, and separately and severally filed with said demurrer memorandum, as required by statute, the substance of which said memorandum is as follows:

“Each defendant says that the said written instrument set forth in said paragraph of complaint as Exhibit “E,” is a release and discharge, and, by the terms of said written instrument as set forth as Exhibit “E,” said plaintiff released and discharged the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them, from any and all liability in connection with the said indebtedness of the Modern Specialties Manufacturing Company and released and discharged the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them, from any and all liability on the said contract of suretyship as sued upon in said fourth paragraph of complaint and set forth as Exhibit “A.”

“Each defendant further says that by the terms of said suretyship contract set forth in said paragraph as Exhibit “A,” the said F. G. Eberhart and R. G. Page and George W. Blair, and each of them were cosureties of each of these defendants and equally bound with each of these defendants to pay to plaintiff the said principal obligation of the Modern Specialties Manufacturing Company.

“That the execution and delivery of said written instrument, set forth in said paragraph of complaint, as Exhibit “E,” to the said Eberhart, and the said release and discharge of said F. G. Eberhart, R. G. Page and George W. Blair, from any and all liability in connection with the indebtedness of the defendant, Modern Specialties Manufacturing Company, and from any and all liability on said contract of suretyship, released and discharged each of these defendants from any and all liability on said contract of suretyship as sued upon in said paragraph of plaintiff’s complaint.

“That by reason of the premises each of these defendants is not now liable to plaintiff by reason of said contract of suretyship as sued upon in said paragraph of complaint as Exhibit “A.”

The demurrer being sustained, appellant refused to plead further, and judgment was rendered against it—that it take nothing by its complaint, and that appellees recover their costs. From this judgment, this appeal is prosecuted.

The only error assigned is the action of the court in sustaining said demurrers of appellees to said paragraph of complaint.

The question, and the only question presented for our consideration on this record, is as to Exhibit E. What is its legal force and effect—a “release,” or a covenant “not to sue”?

It was and is the rule at common law that a “release” of one surety released all the sureties, but the instrument relied upon to have this effect

1. must have been of the kind spoken of in the books as a “technical release”—an instrument under seal. *Dean v. Newhall* (1799), 8 T. R. 168; *Walker v. McCulloch* (1827), 4 Greenl. (Me.) *421; *McAllister v. Sprague* (1852), 34 Me. 296; *Rowley v. Stoddard* (1810), 7 Johns. (N. Y.) 207; *Shaw v. Pratt* (1839), 22 Pick. (Mass.) 305; *Jackson v. Stackhouse* (1823), 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Tharpe v. Tharpe*, 1 Ld. Raymond 235.

This, because the seal affixed to the release furnishes a conclusive presumption that the releasor has been fully satisfied, and the inevitable conclusion drawn from that proposition is that the releasor, having received full satisfaction, could have no further right of action against anybody. L. R. A. 1915 E

807, note. And if the instrument relied upon as such release was not under seal, then it was construed as a "covenant not to sue," which was personal to the parties thereto, and, to avoid circuitry of action, operated as a release of the party to whom given, but did not operate as a release of a cosurety or cosureties. *Parmelee v. Lawrence* (1867), 44 Ill. 405, and authorities, *supra*.

The rights of the parties in cases such as the instant one has been well stated by the Supreme Court of Arkansas in the case of *Gordon v. Moore* (1884), 44 Ark. 349, 51 Am. Rep. 606, where the court said:—"As to Moore all were principals from the beginning, inasmuch as he had the right to collect the debt of all or either. He was only required to take cognizance of their relation to the extent of avoiding any act which would prejudice the rights of the sureties to obtain exoneration from the principal, or contribution amongst themselves. * * * Sureties *inter sese* are joint obligors; all secondarily liable together. Their mutual rights and obligations were first determined in the courts of chancery and enforceable there alone. It is still the more appropriate forum, from its more flexible means of adjustment; but courts of law have long assumed a concurrent cognizance of these rights and will enforce them as defenses. * * * The right of a surety compelled to pay a debt as against his cosurety is not exoneration of the burden. It is his as much as his fellow's. It is the right of contribution, the right to recover from his cosurety just so much as will make both equal in the loss. It is obvious that by the discharge of one surety the others are injured (or would be) just to the extent of their right of contribution.

* * * This mode of adjustment injures no one. Its plain common-sense equity commends itself to every man's sense of right, and is harmonious with the well-settled rule that the release of the principal discharges the surety altogether, because it takes away the right to exoneration. When the relief goes beyond the injury it becomes technical and arbitrary."

The doctrine that, where one or more of several cosureties has paid his or their full proportion of the debt in question, and were given a simple release from all further liability to pay said debt, such instrument shall be construed only as a covenant not to sue, and does not release the cosureties, is recognized and declared to be the law in many jurisdictions. See 34 Cyc 1084 for authorities.

In *Parmelee v. Lawrence*, *supra*, the instrument was as follows: "Received, Boston, August 12th, 1864, twenty-two thousand five hundred and fifty-seven dollars, of Liberty Biglow, in full payment of his portion of all money due me on articles of agreement between myself, him, (said B.), F. Parmelee, D. A. Gage and W. S. Johnson, dated September 15, 1856, and recorded in the recorder's office of Cook county, Illinois, October 17th, same year, in book 171 of deeds, page 71; and I release and discharge said Biglow, his property and estate, from all claims on account of same.

"If the property mentioned in the above articles has to be sold under any order of the court at Chicago, the interest of said Biglow in it is to be protected according to this settlement. Nothing herein contained shall in any wise affect my rights or de-

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mand against said Parmelee, Gage or Johnson, or their interest in said property.

(U. S. Rev. Stamp.)

Daniel Lawrence. (Seal)."

The court in declaring the legal effect of the foregoing instrument said: "The weight of the modern authorities is * * * in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue."

This case is followed and approved in subsequent decisions of that court, and has also been cited as authority by the Supreme Courts of both Maine and New Hampshire.

In the case of *Dean v. Newhall, supra*, the instrument sued on was a joint and several bond by one Taylor and Newhall to pay plaintiff Dean £200 on a day certain. Taylor became insolvent and assigned all his effects to F. and B. in trust for themselves and all other creditors who should execute the deed. Plaintiff, one of the creditors, executed the deed and received a dividend under it of £48. In the deed was contained a covenant that: "They would not sue, arrest, implead or prosecute Taylor, his executors, or administrators, or his or their goods, &c., for or on account of any debt, &c., and in case any of the said creditors should sue, &c., those presents should be a sufficient release and discharge to all intents and purposes both at law and in equity to and for the said C. Taylor, his executors, &c., and he and they should

be and were thereby acquitted, released and discharged against them, the said creditors, &c., and as such should and might be pleaded in bar by him, the said C. Taylor, &c.' ” The defense was that as Taylor was released, Newhall was also released. Lord Kenyon held the above to operate as a covenant not to sue, and that plaintiff was entitled to judgment against Newhall.

In the case of *Rowley v. Stoddard, supra*, the Stoddards were indebted to Rowley on a note for \$200. The elder Stoddard paid \$100 and took a receipt from Rowley, “in full of all demands” against him, the elder Stoddard. The receipt having been pleaded, as a release, the court said: “The settlement made in the case before us is somewhat in the nature of an agreement not to prosecute the elder Stoddard. But a technical *release under seal* is necessary to be given to one of several debtors, in order that the others may avail themselves of it as a discharge.”

In *Shaw v. Pratt, supra*, it was said that, at common law, the instrument relied upon as a release of one, to effect the release of all sureties or joint and several makers, must have been a technical release under seal.

In this case, which was an action upon a promissory note, signed by John and John B. Pratt, the holder executed an instrument as follows: “In consideration * * * I hereby agree and bind myself and my heirs to discharge the note, being a joint and several one, signed by John Pratt and John B. Pratt, and held by me, so far as John B. Pratt is or may be liable to pay the same, except that this agreement shall not operate in any way to discharge or affect the suit already begun by me against John Pratt, and

for which a farm on New Ashford has been attached on said note.' ”

In the case of *Couch v. Mills* (1839), 21 Wend. (N. Y.) 424, and which was an action upon promissory notes made by the defendants, the plea interposed by defendant Mills was in substance as follows: That the plaintiff by a certain writing under seal, in consideration of \$500 paid to him by Henry Talmage, one of the defendants in said action, covenanted and agreed with said Henry Talmage that neither he, the plaintiff, nor his executors, etc., should at any time or times thereafter sue the said Henry Talmage, or levy upon his goods or chattels for or by reason or in consequence of the promises and undertakings in this declaration in this case mentioned; and in case any proceeding, either at law or in equity, should be had, continued, or prosecuted, then that the said writing should be deemed to all intents and purposes a release to him, the said Henry Talmage, from and against the same; that the plaintiff continued and prosecuted his suit against said Henry Talmage, contrary to said covenants in said writing contained, whereby the said writing became and was and is an absolute release and discharge to the said Henry Talmage, and the other defendants in this suit.

To this plea, in sustaining the demurrer thereto, the court said: “The language of the instrument, as set forth, is undoubtedly very particular; but it is manifest, from the whole scope of it, that it was not intended to have the operation and effect of a technical release upon the subject-matter of the suit; but only to protect the rights of the covenantee, * * * to construe it into a technical release of all, would be carrying the obligation beyond the ob-

vicious intent of the parties. If it had been intended to be so understood, more direct and pertinent language would have been used.”

In *Jackson v. Stackhouse*, *supra*, Thurman and Stackhouse had executed a bond. Upon this bond was the following indorsement: “ ‘I, Nicholas Roosevelt, do hereby fully release and discharge the within named obligor, James L. Thurman, from all liability on the within bond, and rely on the mortgage given with the bond, as my security for the payment of the money mentioned in the bond. January 21st, 1817.

“ ‘Nicholas Roosevelt.’ ”

The court in passing upon the matter said: “The endorsement on the bond by Roosevelt was intended to discharge Thurman from personal liability only, and that the mortgage should remain a lien on the land. It may be questioned, whether the writing can have any effect. A release, not by deed, and without consideration is void, * * * no consideration is stated, and it is not under seal; if it had been, it would be construed as a covenant not to sue Thurman, and operate as a release to avoid circuity of action.”

The case of *Walker v. McCulloch*, *supra*, was an action upon a promissory note, executed by McCulloch, Jonas Clark and Henry Clark. The note bore the following indorsement: “ ‘April 2d, 1821. Received of Jonas Clark one-third of the amount of the within note and interest, and he is hereby discharged from the same.’ ” It was insisted that this was a release, and that thereby all parties to said note were released. In passing upon the question the court said: “It is not under seal, and therefore is not a

technical release. It might have been explained by parol evidence as other receipts are explainable.

* * * The receipt in question cannot amount to more than a perpetual covenant for the benefit of Jonas Clark. * * * Nothing short of payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract.

The case of *McAllister v. Sprague*, *supra*, was an action in assumpsit against joint debtors. The instrument relied upon as a release was as follows: "Received of Jotham L. Sprague one red horse (described), in full for his half of our account against him and E. L. Murphy, * * * to be his discharge in full for debt and cost, but no discharge for Murphy." "

It was contended that this instrument should be given the effect of a formal release, but the court said: "But the receipt in this case was not a technical release, it was not under seal, and if it had been, it could not fairly be understood to mean that the whole debt should be discharged by the present release of Sprague. Its language does not imply an intention to cancel the whole debt, although the consideration might be adequate for that purpose and also to release Sprague, without its being under seal. Such effect might have been given to it, if it had been so intended." The receipt was declared to be in effect a covenant not to sue Sprague, and that Murphy was not thereby released.

In Indiana, the leading case upon the question now under consideration is *Stockton v. Stockton, Jr.*, (1872), 40 Ind. 225, and Alabama seems to be the only state whose decisions are in harmony with those of Indiana.

The Stockton case was a suit upon a note for \$2,400 and due in twelve months. Lawrence B. Stockton was principal; one Moore and William and Martin Stockton were sureties thereon for said Lawrence. Before maturity, Moore paid, by giving an order for the amount, \$500, the holder agreeing, in consideration thereof, to release him from all further liability thereon. Held, the release of Moore released the other sureties. Citing *Aylesworth v. Brown* (1869), 31 Ind. 270.

In the Aylesworth case, *supra*, Barbee, Brown and Company held a judgment against Frederick Geiger and James Fallis for \$6,115.68; Geiger paid one-half thereof, and an instrument was executed, which the court construed as a covenant by Barbee, Brown and Company not to pursue Geiger further in the collection of the judgment. The court, in speaking of the contention of the respective parties, said: "The general proposition is familiar, that the release of one of several joint debtors is a release of all the others; and the appellant contends that that proposition is applicable in this case. This is not technically a release."

The Aylesworth case we next find cited in the case of *Paul, Admr., v. Logansport Nat. Bank* (1877), 60 Ind. 199. In this last case one Orton had executed his promissory note for the sum of \$2,000, with Paul and Reynolds as sureties thereon, payable to one Murdock ninety days after date. Eight days after this note became due said Reynolds made an assignment of all his property for the benefit of creditors. The deed of assignment stipulated that the trustee complete the execution of the trust within three years. Afterwards Paul, the other surety, died, and the

note was filed by the bank as a claim against his estate.

The appellant administrator urged two propositions for a reversal of the case, viz.: "1. That the assent to the assignment of Reynolds, by the bank, operated as an agreement not to sue him for three years, and that the rights of his cosurety, Paul, were injuriously affected thereby; and, 2. That said assent operated as a release of said Reynolds, one of the makers of a joint note, and that that release was, in law, a release of all the makers of said note."

In passing upon the question, the court said: "If the act of the bank, in assenting to the assignment, operated as an agreement not to sue for three years, as to which we express no opinion, that agreement was no bar to a suit within that period of time. (Citing authorities.) As to the second point, it is true that a release of one of the makers of a joint obligation may release all (Citing 1 Parsons, Contracts 27, and the Stockton case, *supra*.) But this principle has no application to the case before us."

The Aylesworth case is next cited in the case of *Walls v. Baird* (1883), 91 Ind. 429. In this last case there was a note for \$1,868.50, executed by Lane and Walls, partners, to Baird. They dissolved their partnership business, and later Baird, in consideration of \$381.38 paid to him by said Lane, and the surrender of a certain other note, released Lane "of any further obligation of security to said note." Afterward Baird sued Walls for the balance due on said note and to foreclose the mortgage executed by Walls and Wife to secure the payment thereof, in which mortgage they had expressly agreed to pay said note, and the court said, citing the Aylesworth case:

“The law is well settled that the unconditional release of one or more of joint obligors releases all the joint obligors. * * * But we do not see that these questions are well presented.”

The case of *Tyner v. Hamilton* (1875), 51 Ind. 259, is another case in which the doctrine as to the release of one surety releasing the other sureties is announced. In this case it appears that one Margaret Hamilton had been the guardian of one John W. Hamilton; that as such guardian she sold lands belonging to her ward, and received a promissory note in payment therefor; that she afterwards purchased lands in her own name, and used the note so received in payment for lands of her ward, so sold by her, in part payment for lands so purchased by her; that after the said ward became of full age, for a valuable consideration he did “ratify and confirm the said act of my said guardian in so investing said money, and release any and all right of action I may have against said Parkison or Pace, or either of them, on account of said act of my said guardian, as sureties on my said guardian’s bond, or otherwise. But nothing herein contained is to be construed as a release of John J. Phillips on said bond.” The suit was brought against Margaret Hamilton, the former guardian, and against one Tyner to recover the value of the note belonging to said ward, and used by her in part payment of the lands so purchased by her, she having turned said note over to one Phillips, and he to said Tyner. Tyner was not a surety on said guardian’s bond. There was a judgment against Tyner, and he appealed. The question presented to the court was the legal effect of the ratification by said ward of the use of said note so made by his said

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guardian. The court held that the ratification by said ward, after he became of full age, with full knowledge of all the facts, was a bar to the action. This was the only question in issue. On petition for a rehearing the court said, "A release of one or more of the joint obligors in a bond is a release of all." Clearly this was pure *dicta*.

The Stockton case is also cited in the case of *Erwin v. Scotten* (1872), 40 Ind. 389. This last was an action by Scotten as administrator, upon a joint promissory note, signed by William P. Erwin, William Comer, and Edwin Erwin. Process had been served upon William P. Erwin and William Comer, but not on Edwin Erwin. Judgment was rendered against the two defendants served, and afterwards the plaintiff filed his petition asking that said Edwin Erwin be served with process etc., and that he be made a party to said judgment theretofore obtained. The action was brought, and was then pending in the Wayne County Court of Common Pleas, and the defendant, after being served with process, entered his special appearance and filed answer in which he alleged that he was and had been, etc., a resident of Huntington county; that the note was a joint note, and plaintiff had already taken a joint judgment against the other two makers thereof, etc.; and that the court was without jurisdiction over him. A demurrer to this answer was sustained, and this was the only question presented by the record on appeal. In the opinion of the court, p. 399, in discussing the effect of a statutory provision, the court said: "We have, in the case of *Stockton v. Stockton*, ante, p. 225, applied the principles of the common law to a joint obligation by holding that the release of one joint obligor was a release of all the other joint obligors."

An examination of the authorities reveals the fact that at common law the only release, given by the creditor to one or more sureties, upon a written obligation to pay money, as such, which had the effect of discharging all the sureties thereon, was a "formal" release, a "technical" release, to wit, an instrument under seal, and it was given that effect for the reason hereinbefore stated. The confusion seems to have arisen from a loose use of the word "release," in not confining it to its original meaning of having reference to sealed instruments only.

It has been argued by counsel that the release of one surety by an instrument such as the one involved in this case discharges the other sureties, because such a release changes their contract. With this statement we cannot agree. So far as the sureties are concerned, they have first a contract with the holder of the instrument by which they and each of them agree to pay such holder the entire amount of said contract indebtedness, it remaining unpaid. As between them and each of them, and their principal debtor, the law implies on his part a promise to exonerate them, and each of them, for, and to the amount of, any money that they or either of them may be called upon to pay to such holder, in discharge of such obligation, while, as between such sureties, the law implies on the part of each of them a promise to contribute his proportional part of such indebtedness based upon the number of solvent sureties, as any of his cosureties is called upon to pay. But this promise the law only implies, or raises, as against him, after there has been a payment by his cosurety, or cosureties, of more than their full proportionate part or parts of such indebtedness, determined as

aforesaid. The first above-mentioned contract is express. The other two agreements are implied in law. If one of such sureties pays to the holder of such instrument his full proportionate part thereof, clearly his cosurety, or cosureties, cannot call upon him for contribution, upon their paying the balance, for he has already fully discharged his obligation, and under the circumstances the law will not imply a promise on his part to contribute to his cosureties, and, if there is no such promise, we fail to see wherein the alleged contract has been changed, and, if such contract has not been changed as to such surety, we see no legal or valid reason for holding the cosurety in such case discharged.

Blackstone, Book 1, p. 70, says: "And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; they tell us, that the law is the perfection of reason, and that it always intends to conform thereto, and that what is not reason is not law."

We are of the opinion that the demurrer in this case should have been overruled; that the complaint herein states a cause of action; but, as the rul-

2. ing of the court herein seems to be in harmony with *Stockton v. Stockton*, *supra*, and that case being now binding upon us, we are without power to reverse this case. We therefore transfer it to the Supreme Court for their consideration, and respectfully recommend that the said *Stockton* case be overruled, so far as it may be held to be applicable to parol, or simple releases.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. BOYS.

[No. 9,790. Filed June 3, 1919. Rehearing denied October 7, 1919.]

1. CARRIERS.—*Carriage of Passengers.—Injuries to Passenger.—Action.—Complaint.—Sufficiency.—Negligence.*—In an action against a railroad company by a passenger for injuries sustained in alighting from a moving train at a flag station, a complaint alleging that the injuries resulted from the negligence of defendant in not stopping the train as scheduled and advertised, and on account of the brakemen leading plaintiff to believe that the train had come to a full stop, *held* to show negligence on part of defendant. p. 106.
2. CARRIERS.—*Carriage of Passengers.—Injuries to Passengers.—Action.—Complaint Showing Contributory Negligence.—Sufficiency.*—In an action against a railroad company for injuries sustained by a passenger in alighting from a moving train at a flag station, paragraph of complaint *held* to show plaintiff guilty of such negligence as to preclude recovery. pp. 106, 107.
3. CARRIERS.—*Carriage of Passengers.—Injuries to Passenger.—Contributory Negligence.—Alighting from Moving Train.*—It is not negligence *per se* for a passenger to alight from a moving train. p. 107.
4. JUDGMENT.—*Motion in Arrest.—Insufficiency of Complaint.—Failure to Raise Question by Demurrer.—Statute.*—In an action for personal injuries, where defendant failed to present the question by demurrer whether the first paragraph of complaint showed that plaintiff was guilty of negligence proximately causing his injury, the right to raise that question by a motion in arrest of judgment is denied by §344 Burns 1914, Acts 1911 p. 415, and there was no error in overruling the motion. p. 111.
5. CARRIERS.—*Carriage of Passengers.—Destination of Passenger.—Notice to Carrier.*—There is no primary obligation on a passenger for a flag station to notify the train conductor of his destination, as stipulated in his ticket, before the arrival of the train at such point, in the absence of a rule of the carrier, known to the passenger, requiring that such notice be given. p. 114.
6. CARRIERS.—*Carriage of Passengers.—Destination of Passenger.—Notice to Carrier.*—In the absence of a rule of the company, so known and promulgated as to bind the passenger, requiring a passenger for a flag station to notify the train conductor of

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his destination, as stipulated in the ticket, before the arrival of the train at such point, the ticket sold by the carrier to the passenger is conclusive notice to the former of the fact of the passenger's destination. p. 114.

From Grant Superior Court; *Robert M. Van Atta*, Judge.

Action by Clifford C. Boys against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

George E. Ross, for appellant.

E. H. Graves and *G. A. Henry*, for appellee.

McMAHAN, J.—The appellee's complaint is in two paragraphs. In the first it is alleged that appellant is a corporation engaged in the operation of a railroad passing through Gas City and Upland; that appellee purchased a ticket from appellant's agent at Gas City entitling him to be carried from Gas City to Upland; that he took passage on a train leaving Gas City at 2:17 a. m., scheduled and advertised to stop at Upland on flag to take on and discharge passengers. It is then averred: "That as said train approached the station at Upland, it began to slow down, and that he, the plaintiff, believing that it would come to a full stop as it was scheduled and advertised and as the defendant company had agreed, went to the front end of the car in which he was riding and the brakeman on said train being then and there in the employ of this defendant company said to this plaintiff, 'Do you get off here?' and, being answered in the affirmative, the said brakeman opened the door of said car and said, 'All right,' and it being in the nighttime and dark and there being no

light at said station and this plaintiff being led to believe that said train had come to a full stop and relying on what had been told him by the said brakeman and the promise of said defendant company, stepped from said car, but on account of said defendant company not bringing said train to a full stop as it had agreed and as this plaintiff was led to believe and did believe, said plaintiff was thrown on the brick walk along the side of defendant's tracks, his head, face and ear were cut, scratched and bruised, his shoulder and back were cut, scratched, bruised and sprained and he was rendered unconscious.

* * * Plaintiff further avers that all of the injuries herein complained of were caused by the negligence of this defendant company in not stopping said train as it had scheduled, advertised and agreed to do and on account of the said company, through their said brakeman leading him, the plaintiff, to believe that said train had come to a full stop and that he, the plaintiff, was wholly without fault. Wherefore," etc.

The second paragraph, after alleging that appellant is a corporation engaged in the operation of a railroad, the purchase of a ticket by appellee, and the taking passage as alleged in the first paragraph, alleges that: "As said train approached said town of Upland it began to slow down and the plaintiff believing that it would come to a full stop as it was scheduled and advertised by defendant to do, left his seat in said train and went forward to the front end of the car in which he was riding, and that an employe of said defendant, the brakeman upon said train, said to this plaintiff, 'Do you get off here,' and upon the plaintiff answering in the affirmative, said brakeman opened the door of said car and said to the plaintiff,

'All right.' Said plaintiff avers that it was in the nighttime and that there were no lights displayed at said station and that it was dark at the point where passengers were accustomed to alight from trains at said station, and this plaintiff being led to believe from the said remarks and action of said brakeman that said train would come to a full stop went upon the platform and steps of said car for the purpose of alighting therefrom but he says that said train did not come to a stop at said station of Upland as he had a right to believe that it would, but after slowing down the speed of the train as aforesaid, said defendant through its employes, began to increase the speed of said train and this plaintiff seeing that he would be carried thus past his station, and while said train was running slowly and not to exceed five miles per hour, he stepped therefrom to the platform of said station and it being dark and being unable to see his way, said plaintiff by the motion of said train was thrown violently upon the said platform which was of brick and fell thereon with great force, and by reason of said fall" was injured, the alleged injuries being set out in detail. It is also alleged that the injuries were occasioned through the negligence of the appellant in the careless and negligent operation of the train and in not bringing it to a full stop at Upland.

Appellant filed a demurrer to each paragraph of complaint, which was overruled and exception saved.

There was a trial by jury, verdict and judgment for appellee. The jury was required to and did answer a number of interrogatories which they returned with their general verdict.

The errors relied on for reversal are the overrul-

ing of the demurrer to each paragraph of complaint, the overruling of a motion in arrest of judgment, and the overruling of the motion for a new trial.

The only objection made to the first paragraph of complaint is that no facts are alleged to show that appellant was guilty of any negligence. We

1. cannot agree with appellant. This paragraph clearly shows negligence on the part of appellant. All other objections to this paragraph are waived. There was therefore no error in overruling the demurrer to it.

The appellant next insists that the facts alleged in the second paragraph of complaint show, among other things, that the appellee was himself

2. guilty of negligence which was the proximate cause of his injury. According to the averments of this paragraph of complaint, as the train approached the town of Upland it began to slow down, and plaintiff, believing that it would come to a full stop, left his seat and went to the front end of the car in which he was riding, when the brakeman on the car asked him if he got off there, and, on receiving an affirmative answer, opened the door of the car and said, "All right"; that it was about 2:30 a. m.; that the night was dark; that no lights were displayed at the station; that appellee was led to believe from the remarks and action of the brakeman that the train would stop, and that he went upon the platform and the steps of the car for the purpose of alighting; that the train did not stop; that its speed was increased, and that appellee, believing that he would be carried past the station, and while the train was running not more than five miles an hour, stepped off the train to the platform of the station

at a time when it was so dark that he could not see his way, and that by the motion of the train was thrown violently upon the brick platform with sufficient force to severely injure him and to render him unconscious.

Do these facts show negligence on the part of appellee which was the proximate cause of his injury?

The law is well settled in this state that it

3. is not negligence *per se* for a passenger to alight from a moving train. The circumstances and conditions under which he acts must all be considered. Each case must be determined on its own facts. *Pittsburgh, etc., R. Co. v. Miller* (1904), 33 Ind. App. 128, 70 N. E. 1006; *Harris v. Pittsburgh, etc., R. Co.* (1904), 32 Ind. App. 600, 70 N. E. 407; *Louisville, etc., R. Co. v. Crunk* (1889), 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443.

If the facts pleaded show that the appellee was at fault in leaving the train as he did, and that he thereby contributed to his injury, then the de-

2. murrer should have been sustained. The pleading discloses that the plaintiff voluntarily left the train while it was in motion. The only excuse he gives for so doing is that he saw the speed of the train was being increased and that he would be carried past the station where he wished to get off the train. He does not allege that anything was said or done by any of the employes of appellant that induced him to alight. The only thing the employes did, according to his complaint, was to lead him to believe that the train would stop. The conversation with the brakeman, which he says caused him to so believe, took place when he left his seat and went to the front end of the car in which he was

riding, when the brakeman asked, "Do you get off here," and being answered in the affirmative, opened the door and said, "All right." This all took place while appellee was yet in the car, just before or at the time that the brakeman opened the door. The act of the brakeman in opening the door and saying, "All right," cannot be construed as an invitation for appellee to alight before the train came to a standstill. The most appellee claims is that he, being thereby led to believe "that the train would come to a full stop, went upon the platform and steps of the car for the purpose of alighting therefrom," as we understand him to mean, when the train should come to a full stop. Nothing else was said or done by the brakeman. The appellee, without anything more being said or done, walked out of the car, down the steps, and alighted from a moving train in the nighttime when it was so dark that he could not see his way. The appellee knew the train had not stopped, he knew the speed was being increased, and, believing he would be carried past his station, stepped off.

There is but one conclusion to be drawn from the facts pleaded. The appellee was guilty of such negligence as will preclude a recovery. The demurrer to the second paragraph of complaint should have been sustained. *Pittsburgh, etc., R. Co. v. Miller, supra.*

As said in the case just cited, the facts differentiate this case from those in which the train is not stopped a sufficient time to allow the passenger to leave it, from those in which he is invited or directed by the trainmen to alight, and also from those in which the passenger's action is influenced by his tender age or other incapacity.

This paragraph of complaint is very like the first paragraph of complaint in *Jeffersonville, etc., R. Co. v. Swift* (1866), 26 Ind. 459, which the court held bad, saying: "It admits that the plaintiff voluntarily leaped from the cars while they were in motion—running at the rate of one-third their usual speed—and by reason thereof received the injuries complained of, and the only excuse alleged for this extremely imprudent and perilous act is, that the train was being run past *Amity*, where he wished to leave it, and where it was the duty of the conductor to stop the train and let him off. These facts, however, do not afford a justification for so rash an act as that of leaping from the train when in motion. *Jeffersonville Railroad Company v. Hendricks, Adm'r*, ante p. 228. Admitting that those having charge of the train, in negligent disregard of their duty, were running it past the station, and that they did not intend to stop there, still, the paragraph shows that the injury to the plaintiff was the immediate result of his own imprudent and rash conduct; and there is no principle of the law more clearly settled, or more universally recognized by all the courts, than that in suits for such injuries, though the defendant may have been guilty of negligence, yet if the plaintiff's own want of reasonable care and caution directly contributed in producing the injury, he cannot recover."

In *Reibel, Admx., v. Cincinnati, etc., R. Co.* (1888), 114 Ind. 476, 17 N. E. 107, the complaint was held insufficient, the court saying: "The general rule is, that passengers who are injured while attempting to get upon or off a railroad train while it is in motion cannot recover for their injuries. * * * To

this general rule, some exceptions have been recognized, one of which is where the passenger is either ordered or invited by the company or its agents to get on or off, notwithstanding the motion of the train. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26; *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441. But a passenger must not attempt either to get onto or off a train while it is in motion, if it be obviously dangerous to make the attempt, although he may have been advised, or even ordered, to do so by the servants of the company. 2 Wood Railway Law, 1127. Such an attempt is at the peril of the passenger, when he is a person of ordinary intelligence and not acting under constraint. While it is the plain duty of a railroad company to stop its train at the place of a passenger's destination long enough to permit him to get off with safety, the fact that a train is about to pass such place of destination without stopping does not justify the passenger in incurring any serious risk by jumping from the train. In such a contingency, the passenger's remedy is against the company for carrying him past his place of destination."

In *England v. Boston, etc., Railroad* (1891), 153 Mass. 490, 27 N. E. 1, the court said: "The plaintiff acted on the belief that the train had stopped when it had not stopped, and this mistake was due to her own omission to use reasonable care. The fact that it was dark where she attempted to alight rendered more caution not less necessary on her part. To step off of the train where it was, as the plaintiff's husband testified, 'so dark that a person couldn't see where he or she was going,' under circumstances that

did not amount to an invitation on the part of the defendant to do so, or an assurance that it was safe to do so, and where no necessity existed for doing it, was of itself a contributory act of carelessness on the part of the plaintiff."

And in the case of *East Tennessee, etc., R. Co. v. Holmes* (1893), 97 Ala. 332, 337, 12 South 286, 288, the court said: "He made the leap of his own accord, at great peril to his life and limb, because, as it would seem, he did not desire to be carried beyond his destination. He thus took the risk of his own reckless venture, and the defendant ought not to be made to pay for it. There was not even the excuse of necessity for his having done so. * * * No one has the right to leap from a moving train, because he is being carried beyond his destination, with the expectation of claiming from the railroad company damages for any injury he may sustain. His duty is to remain aboard, and demand redress for the injury that may have been done to him." See, also, *Toledo, etc., R. Co. v. Wingate* (1895), 143 Ind. 125, 37 N. E. 274, 42 N. E. 477.

The next assignment of error is that the court erred in overruling the motion in arrest of judgment, the contention of appellant being that both para-

4. graphs of the complaint show that appellee was guilty of contributory negligence which was the proximate cause of his injury. It is a sufficient answer to this objection to say that the appellant did not present this question by the demurrer addressed to the first paragraph of complaint, and, not having done so, the right to raise the question by a motion in arrest of judgment is denied by §344 Burns 1914, Acts 1911 p. 415. There was no error in overruling the motion in arrest of judgment.

Appellant also contends that the court erred in giving certain instructions to the jury. Instruction No. 3, given at the request of appellee, is as follows: "I instruct you that there is no legal obligation upon a passenger upon a regular railroad passenger train to notify the conductor of such train of his point of destination. The railroad company by the sale of a ticket to such a passenger already knows his destination and the conductor of its train is but the servant of such company and is bound by its knowledge. So, in this case, if you believe from the evidence that the plaintiff bought a ticket for the town of Upland, Indiana, of the defendant's agent at Gas City, and with said ticket went upon a passenger train of the defendant for transportation to said town, I then instruct you it was the duty of the conductor of said train and of the other of defendant's employes and servants upon said train to know the destination of said plaintiff and to stop said train at said town of Upland a reasonable length of time to allow the plaintiff to alight therefrom."

Appellant insists that this instruction is erroneous, because it is not applicable to the evidence or relevant to the issues, is misleading, and invades the province of the jury. The contention of appellant is that it is the duty of a person going upon a train to make known to the conductor or person in charge of the train his destination, especially if his destination is a flag station where the train does not stop regularly.

In *Chattanooga, etc., R. Co. v. Lyon* (1892), 89 Ga. 16, 16 S. E. 24, 15 L. R. A. 857, 32 Am. St. 72, it was held that, when a railroad company sells a ticket to a flag station at which its trains do not stop unless signalled to do so for the purpose of receiving passengers, or when there are on board

passengers for such station, it is ordinarily the duty of the conductor to ascertain from the passenger before reaching such station that such is the passenger's destination, and to stop the train there for the purpose of allowing the passenger to leave the train. This rule, under special circumstances, is subject to exceptions. The Supreme Court of Georgia in the case last cited said: "The holder of the ticket has, ordinarily, the right to assume, when he buys it, that the company will safely land him at his destination. Accordingly, he has the right to presume the conductor will call for his ticket before reaching the station specified, and thus obtain notice of the fact that he desires to stop at such station.

* * * There may be circumstances under which a passenger for a flag station is carried beyond his destination when it would not be fair or just to attribute the fact to the company's negligence. In a recent Texas case, *Gulf C. & S. F. Ry. Co. v. Ryan*, 18 S. W. Rep. 866, it appeared that defendant in error bought a ticket to a flag station, knowing it was such and that trains did not stop there 'unless some request was made upon the conductor to do so.' It would seem that he bought the ticket subject to the condition that he must notify the conductor of his destination, and failing to do so, it was held he was not entitled to recover. Aside from instances like this, there may be other occasions, * * * when the conductor will be prevented, without fault on his part, from ascertaining in time the desire of a passenger to stop at a flag station, or when, under the circumstances, it is manifestly the duty of the passenger to see to it that the conductor has the necessary information. In cases of doubt as to which

should take the initiative, the question may very properly be left to the jury."

The general rule is that, in the absence of a rule of the carrier, known to the passenger, requiring the passenger for a flag station to notify the con-

5. ductor of the train of his ticket-stipulated destination before arrival thereat, there is no primary obligation on such ticket passenger to

6. notify the conductor of such passenger's destination. In the absence of such a rule, so

known or promulgated as to bind the passenger, the ticket sold by the carrier to the passenger is conclusive notice to the carrier of the fact of such passenger's destination. *Louisville, etc., R. Co. v. Fuqua* (1914), 187 Ala. 464, 65 South. 396, 52 L. R. A. (N. S.) 668; *San Antonio, etc., Co. v. Dykes* (1898), (Tex. Civ. App.) 45 S. W. 758; *Missouri, etc., Co. v. Glass* (1907), 46 Tex. Civ. App. 126, 102 S. W. 447; *Chattanooga, etc., R. Co. v. Lyon, supra*; *Louisville, etc., R. Co. v. Seale* (1911), 172 Ala. 480, 55 South. 237; *Ft. Smith, etc., R. Co. v. Ford* (1912), 34 Okla. 575, 126 Pac. 745, 41 L. R. A. (N. S.) 745.

We are aware of the fact that there are cases where a different rule has been announced, but, as a rule, there were facts sufficient in each instance to distinguish such cases from the one now under consideration, such as a rule requiring the passenger to notify the conductor, knowledge on the part of the passenger that the train would not stop unless the conductor was notified. *Rock Island, etc., R. Co. v. Stevens*, (1907), 84 Ark. 436, 105 S. W. 1032, 108 S. W. 517, 16 L. R. A. (N. S.) 1132. We find no error in the giving of the instructions.

The judgment must be reversed, however, on ac-

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count of the error in overruling the demurrer to the second paragraph of complaint.

Judgment reversed, with instructions to sustain demurrer to the second paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

CHAPMAN ET AL. v. BENDER.

[No. 9,919. Filed October 7, 1919.]

WILLS.—Rights of Devisees and Legatees.—Election by Husband.—Necessity of.—Statutes.—Where a wife's will devised her estate to her children and provided that they should support her husband, who was made executor, there was such a provision for him that he took under the will, without election, as provided by §3046 Burns 1914, Acts 1907 p. 73, and therefore he had no interest in her real estate under §3016 Burns 1914, Acts 1891 p. 71.

From Vanderburgh Circuit Court; *Duncan C. Givens*, Judge.

Action by Laura Bender against Floyd Chapman and another. From the judgment rendered, the defendants appeal. *Affirmed.*

George K. Denton and *E. H. Ireland*, for appellants.

Roscoe Kiper, *Henry F. Fulling*, *William Smith* and *Allen McCullough*, for appellee.

NICHOLS, P. J.—Appellant Rebecca Schreeder recovered judgment in the Warrick Circuit Court against Frank Werry on a note, after which said Werry transferred the real estate involved in this action to his wife, Mary Werry. A suit was brought

to set aside this conveyance, which was decided in favor of the wife, appealed to the Appellate Court, and affirmed, being reported in 35 Ind. App. 84, 73 N. E. 832. Afterwards the said Mary Werry made her will, which at her death was probated June 6, 1914, in the Spencer Circuit Court. Items 2 and 3 of said will, being the parts thereof in controversy in this case, are as follows:

“Item 2. I give and devise all the residue of my estate, both real and personal, to Philip C. Werry, Katie Preston, Laurie Bender, Rosie Werry and Leslie E. Werry, my five children, share and share alike, it being the intention of this testatrix to divide all my estate equally among my five children; but with the provision that my said children shall provide a comfortable living during his lifetime, for my husband, their father, Frank Werry, at their own homes or at such other as they may with his consent provide; but notwithstanding, they may sell or convey this real estate if they so desire without any limitation of this will.

“Item 3. I constitute and appoint Frank Werry, my husband, my executor of this my last will and testament, and it is my desire that he act as such executor without bond.”

She was, at the time of her death, still the owner of said real estate. Afterward the children of said Mary Werry, devisees in the said will, other than the appellee, conveyed their interests in the real estate to the appellee. Execution was issued on said judgment against said Frank Werry by the clerk of the Spencer Circuit Court, and the sheriff of Spen-

cer county (whose successor in office is appellant Chapman), levied upon the undivided one-third of said real estate claiming it to be the property of the said Frank Werry. Thereupon the appellee filed her complaint in this cause, asking for an injunction against the appellants, enjoining the sale of said real estate. To this complaint the appellants filed an affirmative answer of one paragraph, to which a demurrer by the appellee was sustained by the court, which ruling of the court constitutes the only error assigned. This answer contains substantially the foregoing facts, including the said will, and further avers that said Frank Werry did not and has not made an election under the laws of the State of Indiana to take under the will, and that he is the owner of the undivided one-third of the real estate as the heir of said Mary Werry, deceased.

It is contended by the appellants that said Frank Werry took nothing from his wife's estate by her will, that there was no provision for him under §3046 Burns 1914, Acts 1907 p. 73, and that his interest in his wife's estate is, therefore, by virtue of §3016 Burns 1914, Acts 1891 p. 71. These sections are as follows:

§3046.—“That whenever any personal or real property be bequeathed or devised to any husband, or a pecuniary or other provision be made for him in the will of his late wife, such husband shall take under the will of his late wife, and he shall receive nothing from his wife's estate by reason of any law of descent of the State of Indiana, unless otherwise expressly provided in said will, unless he shall make his election to retain the rights in his wife's estate given to him under the laws of the State of Indiana,

which election shall be made in the manner hereinafter provided."

§3016.—"If a wife die testate or intestate leaving a widower, one third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage; Provided, If the wife shall have left a will, such widower may elect to take under the will, instead of this or any other law of descents of the state of Indiana, which election shall be made within ninety days after said will has been admitted to probate in this state and in the same manner in which widows are now required to elect in such cases."

It will be observed that §3046, *supra*, gives the husband his interest under the will, unless he elects to take under the law, while §3016, *supra*, gives him his interest under the law, unless he elects to take under the will.

If said will makes any bequest, or devise, or any pecuniary or any other provision to or for Frank Werry, appellants must fail, but if there be in said will no bequest or devise, or other provision, for Frank Werry, then appellee must fail.

In such a case the devisees, having accepted the devise, are personally liable for the support of their father in the manner provided in the testator's will and, failing to furnish such support, the father has a right of action to recover therefor against them. *Eikman v. Landwehr* (1909), 43 Ind. App. 724, 88 N. E. 105, 526. This is certainly a provision for him. Further, he is named as executor of the will, which, of course, implies compensation for his services, had there been occasion for his appointment as executor. This has been held to be a provision for him.

Cleveland, etc., R. Co. v. Alexandria Paper Co.—71 Ind. App. 119.

These provisions having been made for him in the will of his deceased wife, he takes under such will, without election, as provided in §3046, *supra*, and therefore has no interest in the real estate under §3016, *supra*. *Studebaker Bros. Mfg. Co. v. DeMoss* (1916), 62 Ind. App. 635, 113 N. E. 417.

The judgment is affirmed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. ALEXANDRIA PAPER
COMPANY.

[No. 9,945. Filed October 7, 1919.]

1. CARRIERS.—*Carriage of Freight.—Schedule of Rates.—Notice.—Statute.*—A schedule of freight rates filed with the Public Service Commission, as required by §5540 Burns 1914, Acts 1911 p. 545, is binding both on the carrier and the shipper, and both are chargeable with notice thereof. p. 121.
2. CARRIERS.—*Carriage of Freight.—Mistake in Rates.—Action for Balance.—Statute.*—In view of §5540 *et seq.* Burns 1914, Acts 1911 p. 545, providing for uniform freight rates and requiring a schedule thereof to be filed with the Public Service Commission, where the rate for transporting coal, as filed with the commission, was sixty-five cents per ton, but the carrier's agent through mistake collected only sixty cents, it was not only the carrier's right, but also its duty to collect the difference between the amount charged by the agent and the rate filed. p. 121.

From Madison Circuit Court; *Luther F. Pence*, Judge.

Action by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company against the Alexandria Paper Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Frank L. Littleton, Charles P. Stewart, John W. Lovett and Arthur A. Beckman, for appellant.

Born, Ritchey & Cronk, for appellees.

NICHOLS, P. J.—This cause was tried in the Madison Circuit Court, without a jury, upon appellant's amended complaint, to which appellee had answered in three paragraphs; the third paragraph was set-off, and is not involved in this appeal. There was a general finding and judgment for the appellee, from which, after a motion for a new trial was overruled, this appeal was taken.

It appears by the complaint that the appellant was a common carrier of freight, and the appellee was an Indiana corporation, engaged in the manufacture of paper at Alexandria, Indiana. In November and December, 1910, it had shipped to it on the Evansville and Terre Haute Railroad, via appellant's railroad, sixty-three cars, containing 2,851.8 tons of coal, freight charges following, which coal was transported and delivered by said companies to, and received and accepted by, appellee at Alexandria. Said carriers had on file with the Public Service Commission of Indiana, and in force and effect at that time, a tariff prescribing a charge for transporting this coal of sixty-five cents per ton. Through mistake, appellant's agent collected from appellee but sixty cents per ton. Thereafter appellant demanded of appellee \$142.56, representing five cents per ton additional, making its full published schedule rate, which appellee refused to pay.

In its motion for a new trial, the overruling of which was the only error assigned, the appellant complains that the decision of the court is not sustained by sufficient evidence, and that it is contrary to law.

Appellee contends that there was no evidence of any tariff being in force prescribing a charge for

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transporting coal from the mines to Alexandria of sixty-five cents per ton, but we have no difficulty at all in determining from appellant's brief, as supplemented by appellee's brief, that the tariff rate as filed with the Public Service Commission was sixty-five cents per ton. Section 5540 Burns 1914, Acts 1911 p. 545, and following sections provide for uniform freight rates, and for filing a schedule thereof with the commission, and make it unlawful for any carrier to charge, demand, or collect, directly or indirectly, any other rate than the rate named and fixed in the schedule required to be filed and adopted by the commission. Such schedule is binding alike on the carrier and the one for whom the transportation is performed, and both are chargeable with notice thereof. The rate charged

2. must be in harmony with the schedule, and it cannot be varied by contract, or by mistake, for such rate, until changed by the commission, is a part of the law. *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.* (1911), 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28. Having by mistake collected but sixty cents per ton for the coal involved, it was not only the right of the appellant to collect the additional five cents per ton, but it was the appellant's duty to collect it, and appellee must pay the schedule rate.

The judgment is reversed, with instructions to the trial court to grant a new trial.

Partlow, etc., Car Co. v. Stratton—71 Ind. App. 122.

PARTLOW-JENKINS MOTOR CAR COMPANY v.
STRATTON.

[No. 10,087. Filed October 7, 1919.]

1. **SALES.—Conditional Sales.—Rights of Parties.**—Where the owner of personal property sells and delivers it to a purchaser, not for the purpose of consumption or resale, at an agreed price payable at a future day, upon the express condition and agreement that the title to the property shall remain in the vendor until the purchase price is fully paid, the vendee, prior to payment, can neither sell nor incumber the property so as to defeat the vendor's title. p. 126.
2. **EVIDENCE.—Pleadings.**—In an action to replevin an automobile truck wherein defendant in his cross-complaint claimed a lien for repairs and supplies under §8294d *et seq.* Burns' Supp. 1918, Acts 1915 p. 621, a fact alleged in the cross-complaint may properly be considered in connection with the evidence in determining the character of supplies furnished by defendant for the truck and entering into the amount of his alleged lien. p. 128.
3. **APPEAL.—Review.—Judgment.—Item of Recovery Erroneously Allowed.—Reversal.**—In an action against a garage keeper to replevin a motor truck left in his possession by a conditional vendee wherein defendant by cross-complaint set up a statutory lien for repairs, storage and supplies, including gasoline furnished at the request of such vendee, in the absence of any evidence showing that the conditional vendee had any authority, either express or implied, from the vendor to purchase gasoline, judgment for defendant on his cross-complaint must be reversed, regardless of his right to a lien for the other items claimed, where there was no evidence of the amount and value of the gasoline so purchased. p. 128.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Partlow-Jenkins Motor Car Company against Fred Stratton. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Born, Ritchey & Cronk, for appellant.

Fred E. Hines, for appellee.

BATMAN, C. J.—This is an action by appellant against appellee to replevin an automobile truck. The complaint is in a single paragraph, and is in the usual form for such actions. Appellee filed an answer in general denial, and also a cross-complaint against appellant, praying that he be awarded a judgment for the possession of said truck and for damages. This cross-complaint alleges in substance, among other things, that appellee is engaged in the business of repairing automobiles, selling supplies, and furnishing storage therefor, in the town of Carmel, Hamilton county, Indiana; that one George Fitch, who was the owner of the gasoline automobile truck in question, delivered the same to appellee for the purpose of being repaired; that he made certain repairs thereon, furnished certain supplies therefor, including gasoline, and kept the same in storage, at the request of said Fitch, who promised to pay appellee therefor; that the repairs, supplies and storage were of the reasonable value of \$283.29; that he demanded payment of said amount from said Fitch, but he refused to pay the same; that said amount is long past due and wholly unpaid; that within sixty days from the time of furnishing said material and performing the services he filed a notice in writing with the recorder of the county of his intention to hold a lien on the automobile truck for said sum, which notice was duly entered of record in the office of the recorder; that at the time he furnished the material and performed the services, and at the time he so filed the notice, he had and has kept and retained possession of the truck; that subsequently he commenced an action in the Hamilton Circuit Court to foreclose his said lien, and was thereafter award-

ed a judgment foreclosing the same for said sum, and the sheriff of the county was ordered to sell the truck in satisfaction thereof. A copy of the notice was filed with the cross-complaint as an exhibit. The record does not disclose the filing of any answer to the cross-complaint. The cause was submitted to the court for trial, resulting in a judgment in favor of appellee on his cross-complaint for \$283.29, the foreclosure of his lien for said sum, and a judgment for the possession of the automobile truck. Appellant filed a motion for a new trial, which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

The only recognized grounds for a new trial set out in appellant's motion therefor are that the decision of the court is not sustained by sufficient evidence, and is contrary to law. On the trial the parties filed a statement of facts, which they agreed should constitute the evidence, the same as if witnesses were present and testified thereto. The following is a substantial statement of the facts so agreed upon: Between October 3, 1916, and March 3, 1917, one George Fitch purchased certain supplies and materials from appellee, and obtained work on said truck, which supplies, work and labor, and the storage of the truck, amounted to a total sum of \$283.29; that on March 5, 1917, appellee filed in the office of the recorder of Hamilton county, Indiana, a notice of his intention to hold a lien on said truck, which was duly recorded on said day; that the notice bore date of March 5, 1917, was addressed to George Fitch, and all others concerned, was signed by appellee, and reads as follows:

“You are hereby notified that I intend to hold a Mechanic’s Lien on one Indiana automobile truck bearing engine number 75351, four cylinder motor, said truck being painted yellow, for the sum of \$283 and 29/100 Dollars, for work and labor done, and materials furnished by me in the repair of said truck, which work and labor done, and material furnished, was done and furnished by me at your special instance and request, and within the last sixty days, and which amount is due and unpaid.”

That under the contract of sale of the truck of said Fitch the title was to remain in appellant until all payments were made, as provided for in the contract of sale; that said Fitch was in default in his payments on the truck before the filing of this action, and is now in default; that appellant never made any agreement with either appellee, or said Fitch for any storage, supplies, work, or labor, and did not have actual knowledge of such work; that on March 3, 1917, said Fitch called appellee by telephone, and told him that he could take the truck; that on said day appellee took possession of the truck on the public highway, about two miles south of the town of Carmel, Hamilton county, Indiana, at the request of said Fitch; that appellee took the truck to his garage, and has held possession thereof at all times since; that the charges for storage, supplies and repairs were not made against appellant, but were made against said Fitch; that a demand was made by appellant upon said Fitch and appellee for the possession of the truck before the filing of this action, and that appellee refused to surrender the possession thereof.

Under this evidence appellant contends that he should have been awarded possession of the automobile truck, as the owner thereof, while appellee insists that the evidence shows, as the court adjudged, that he was entitled to its possession. The evidence, when considered in connection with the reasonable inferences to be drawn therefrom, shows that appellant was the owner of the truck, but that said George Fitch had the lawful possession thereof under a conditional sale contract, and therefore had an interest therein; that while said Fitch had such possession and held such interest he engaged appellee to furnish storage and supplies for the truck, and make certain repairs thereon; that in pursuance thereof appellee furnished the storage and supplies, and made the repairs alleged in his cross-complaint, and took the necessary steps provided by statute to acquire a lien on said truck therefor. §8294d *et seq.* Burns' Supp. 1918, Acts 1915 p. 621.

This being true, we are required to consider whether the lien thus acquired by appellee is superior to the rights of appellant as a conditional

1. vendor. The act above cited is silent in this regard, and hence we must look beyond it to determine the question before us. It is well settled in this state that, where the owner of personal property sells and delivers it to a purchaser not for the purpose of consumption or resale, at an agreed price payable at a future day, upon the express condition and agreement that the title to such property shall remain in the vendor thereof until the purchase price is fully paid, the vendee of such property, prior to such payment, can neither sell nor incumber the property in such manner as to defeat the title of the

original owner and vendor thereof. *Cable Co. v. McElhoe* (1915), 58 Ind. App. 637, 108 N. E. 790. It follows that, unless the evidence shows that said Fitch had either express or implied authority from appellant to contract for said storage, supplies and repairs, appellant's rights as conditional vendor are superior to said lien of appellee. It is not claimed that the evidence shows that said Fitch had any express authority in that regard, and there is no just ground for any such claim. It has been held in this state that, where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair, and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made, and, as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common-law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed in such case to have contracted with a knowledge of the law giving to a mechanic a lien. But where the lien is purely statutory, or where the property is of such a character that it would not be reasonable to anticipate the necessity for any needed repairs for the period of time the property is to or does remain in the possession of the mortgagor, or when it is but reasonable to expect the mortgagor in person to care for or repair the property, in such cases a different

rule may prevail. *Watts, Trustee, v. Sweeney* (1891), 127 Ind. 116, 26 N. E. 680, 22 Am. St. 615. The same rule would apply where the rights involved are those of a conditional vendor instead of a mortgagee. An application of this rule to the evidence in this case leaves in our mind very grave doubts whether it is shown that said Fitch had any authority from appellant to contract for any portion of the alleged storage, supplies, or repairs, but as to one item thereof we are clearly of the opinion that no such authority is shown.

It will be observed that appellee alleged in his cross-complaint that the supplies which he furnished for said truck, and which entered into his total

2. claim of \$283.29, included gasoline, which we may reasonably infer was used in operating said truck. This fact, having been alleged in a pleading filed by appellee in the cause, may properly be considered in connection with the evidence in determining the character of the supplies furnished by appellee for said truck and entering into the amount of his alleged lien. *Colter v. Calloway* (1879), 68 Ind. 219; *Bell v. Pavey* (1893), 7 Ind. App. 19, 33 N. E. 1011.

There is no evidence of any fact from which it can be implied that Fitch had authority from appellant to purchase this item of supplies. Where

3. courts have held that a mortgagor or conditional vendee in possession will be deemed the agent of the mortgagee or conditional vendor to procure repairs to be made, the decisions have usually been based on a presumption that from the nature of the property, the use to which it was to be applied, the knowledge that in such use repairs would prob-

ably be required, and other similar facts, the mortgagee or conditional vendor manifestly intended that such agency should exist. This, it has been said, works no injustice to the mortgagee or conditional vendor, since the repairs made ordinarily enhance the value of the property to the extent of the reasonable value of the repairs, and hence really inures to the benefit of the mortgagee or conditional vendor. This course of reasoning, however persuasive it may be where the making of repairs is involved, loses its influence where implied authority to purchase gasoline for use in operating an automobile is the subject of inquiry. Its purchase neither adds to its value, nor serves to preserve it, but rather provides a means for the one in possession to reduce its value. It would be doing violence to reason to imply the granting of authority to purchase such supplies under the facts of this case. This being true, the judgment must be reversed, regardless of what conclusion we might reach with reference to any implied authority to contract for the other items entering into the amount of the alleged lien, since the amount and value of the gasoline so purchased is not shown by the evidence. *Bilskie v. Bilskie* (1919), 69 Ind. App. 595, 122 N. E. 436, and authorities there cited.

For the reason stated the judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings consistent with this opinion.

TRAVELERS PROTECTIVE ASSOCIATION v. BRAZINGTON.

[No. 9,836. Filed May 9, 1919. Rehearing denied October 7, 1919.]

1. **INSURANCE.**—*Fraternal Insurance.*—*Policy.*—*Construction.*—*"Loss of Four Fingers on Either Hand by Severance."*—Under a provision in the constitution of a fraternal beneficiary association providing for indemnity "in case of loss of four fingers on either hand by severance," the insurer would be required to pay the stipulated indemnity where there is loss by severance of any material part of each of the four fingers on one hand, whenever because of such severance each of the fingers is left practically useless. p. 132.
2. **APPEAL.**—*Disposition of Cause.*—*Death of Appellee.*—Where the death of appellee after submission of the cause is suggested in the record, affirmance of the cause will be as of the date of submission. p. 135.

From Delaware Circuit Court; *Frank Ellis*, Judge.

Action by Alvah C. Brazington against the Travelers Protective Association. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

White & Haymond, for appellant.

Miller, Dailey & Thompson, for appellee.

ENLOE, J.—This was an action upon a policy of insurance. The appellant, as appears from the record, is a fraternal beneficiary association, and the appellee was a member thereof. On July 18, 1914, the appellee received an injury to his right hand, resulting in the severance of the little and ring fingers of said hand at the knuckle joints; the severance of the middle finger at the middle joint; the first or index finger was cut and crushed between the first joint and the distal end of the finger to the extent that the nail of said finger was crushed, or torn off, the side of the finger so cut and crushed

that the bone was exposed to view, and the distal end of said finger, at least so far as muscular tissue is concerned, was also crushed off to the extent that the same was hanging only by some shreds of skin and flesh. The surgeon, in dressing this finger, cut off about three-fifths or an inch of the distal end of the bone of the finger, stitched back the flesh of the distal end that had been crushed off, but not entirely severed, and which flesh so stitched back in due time united with the body of the finger.

At the time of the accident appellee was in good standing in appellant society, and no question is made on this appeal as to the sufficiency of any of the pleadings.

The only error assigned and not waived is the action of the court in overruling appellant's motion for a new trial. This assignment challenges the sufficiency of the evidence to support the verdict, and also the action of the court in giving certain instructions, and in refusing to give certain other instructions tendered by appellant.

At the time appellee was injured one of the articles in appellant's constitution was as follows:

Sec. 2, Art. IX. "Whenever a member in good standing shall, through external, violent and accidental means, under the provisions and limitations of the Constitution and amendments thereto, receive bodily injuries which shall, independently of all other causes, result in the loss of his legs, arms or eyes, within six months from the date of said accident, he shall be entitled to indemnity as follows: \$5,000.00 in case of loss of both legs or both arms by severance; \$2,500.00 in case of loss of one hand or one foot by sev-

erance above the wrist or ankle; \$1,300.00 in case of loss of four fingers on either hand by severance.”

This entire controversy turns upon the construction to be given to the above-quoted section. It will

be noted that *as to the fingers no place of severance is fixed*, as is done as regards severance of hand or foot, as provided above. It will also be noted that the article of the constitution above quoted does not limit the liability by declaring a *total* loss to be requisite. The loss must come by severance; by some act which separates at least some part of each of four fingers on the same hand; it must also be caused by violent, external, and accidental means. Considering this section of the constitution, the object of the parties, the relation of the parties, and the language employed, we think that a fair and reasonable construction of said section is that the appellant would pay the sum named in those cases where, through loss by severance of any material part of each of the four fingers on one hand, because of such severance each of said fingers was left in such condition that it was thereafter practically useless. The loss of the *use of the fingers* was the thing against which indemnity was sought.

In this case there is no contention as to any of the fingers of the appellee, except the first or index finger. As to this finger there is and can be no contention but what a portion thereof was lost “by severance,” but it is contended that, as the testimony shows that appellee had some use of this finger, it was not a “loss” within the terms of the contract.

The court submitted to the jury, at the request of the appellant, certain interrogatories covering,

among other things, the extent of plaintiff's injuries, and which interrogatories and answers thereto were as follows: "No. 5. After plaintiff's injury was the little finger and the third, or ring finger, of his right hand amputated at the last joint? Answer. Yes. No. 6. Was the second finger of plaintiff's right hand, after the injury on July 18, 1914, amputated at the second joint from the distal end? Answer. Yes. No. 7. On July 18, 1914, at the time of plaintiff's injury, was the end of the index or forefinger injured to such an extent that a small portion of the bone was removed and a small portion of the flesh and nail removed? Answer. Yes. No. 8. Has the nail on plaintiff's index finger, since the injury, grown out completely? Answer. No. No. 9. Does plaintiff have the free use of each joint of the index finger. Answer. No. No. 12. Does plaintiff now have the full use of his index finger, with the exception that at times is not quite as sensitive to touch as it was prior to the injury? Answer. The finger is practically useless. No. 13. If you answer Interrogatory Number 12 'No' or in the negative, then state as your answer to this interrogatory the extent of the injury to plaintiff's index finger and what use plaintiff is able to make of said finger at the present time? Answer. The finger is practically useless."

The jury also returned answers to interrogatories submitted by appellee, as follows: "No. 1. Was the end of the index finger of plaintiff's right hand cut off as far back as the root of the nail by the accident and injury except a little bit of skin on the inside of said finger? Answer. Yes. No. 2. As the result of the injury sustained by the plaintiff on the 18th day of July, 1914, has he lost substantially the use of the

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index or front finger of his right hand? Answer. Yes.”

Interrogatories numbered 5, 6 and 7, submitted by appellant, each called for the finding of fact as to the extent of the loss of each of said fingers physically by severance, and Nos. 9, 12 and 13 were each directed to the extent of loss *of use* of the index finger, and were so understood by the jury, and, while the answers to Nos. 12 and 13 are not categorical in form, yet each question is sufficiently answered. In No. 1 of the interrogatories submitted by the appellee the jury found that the end of appellee's index finger, as far back as the root of the nail, had been cut off by the accident in question, and in No. 2 they find that appellee has lost substantially the use of this finger.

The appellant cites the case of *Wiest v. United States, etc., Ins. Co.* (1914), 186 Mo. App. 22, 171 S. W. 570, and insists that it is decisive of the case at bar. In that case the policy provided for loss by severance *at or above the wrist joints* (our italics), and a severance of the thumb, first, second and third fingers, and a portion of the palm of the hand, was held not to be within the condition of the policy.

The case of *Newman v. Standard Accident Ins. Co.* (1915), 192 Mo. App. 159, 177 S. W. 803, also cited and insisted upon by appellant, is not in point, for in this case also the point of severance was fixed as to its minor limits, and plaintiff was held as to his injury, not to be within the terms of the policy, the severance having been below the point fixed in the policy.

The views we have expressed as to the meaning of the clause of the constitution of appellant society

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(§2, Art. IX) finds support in the following cases: *Sneck v. Travelers' Ins. Co.* (1895), 88 Hun 94, 34 N. Y. Supp. 545; *Sheanon v. Pacific, etc., Ins. Co.* (1890), 77 Wis. 618, 46 N. W. 799, 9 L. R. A. 685, 20 Am. St. 151; *Beber v. Brotherhood, etc.* (1905), 75 Neb. 183, 106 N. W. 168, 121 Am. St. 782.

Complaint is also made of the action of the court in giving certain instructions, and the refusal to give others tendered by appellant. The instructions given, taken as a whole, fairly state the law, and are in harmony with the views herein expressed. There was no error in refusing to give the tendered instructions which were refused.

We find no reversible error in the record. The death of appellee since the cause was submitted having been suggested in the record, the cause is

2. therefore affirmed as of the date of the submission. Judgment affirmed.

ARTHUR v. FARMERS MUTUAL INSURANCE COMPANY.

[No. 9,952. Filed October 9, 1919.]

APPEAL.—*Review.*—*Evidence.*—*Sufficiency.*—Where there is some evidence to sustain the verdict, its weight and sufficiency is for the jury, and its finding thereon is conclusive on appeal.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Orland M. Arthur against the Farmers Mutual Insurance Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Fred H. Bowers and Milo N. Feightner, for appellant.

C. W. Watkins and C. A. Butler, for appellee.

NICHOLS, P. J.—This was an action in the Huntington Circuit Court by the appellant against the appellee, on an insurance policy, which insured, among other live stock, a mare that was so injured as to make it necessary to kill it. The manner in which the animal was injured, whether by a storm or otherwise, was in dispute. The case was submitted to a jury, which found for the appellee. The appellant filed a motion for a new trial, which was overruled, at which time ninety days' time was given within which to file a bill of exceptions containing the evidence. It does not appear by appellant's brief that such bill of exceptions was ever filed. Appellee has failed to discuss or to point out this defect, but discusses at length what purports to be a statement of the evidence contained in appellant's brief. Having examined this statement, we must hold that, even if the evidence be properly in the record, it is not sufficient to justify this court in setting aside the jury's verdict which finds that it does not sustain appellant's complaint. There being some evidence to sustain the verdict, its weight is for the jury.

The judgment is affirmed.

OLESKE v. PIOTROWSKI.

[No. 9,930. Filed October 9, 1919.]

1. **INSURANCE.—Life Insurance.—Forfeiture.—Self-Executing By-Laws.**—Where a beneficial association's constitution is in such terms as to render it self-executing, the society need not take affirmative action against a member in order to declare a for-

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- feiture, but the right to benefits is lost immediately upon the default which by the constitution forfeits rights to benefits. p. 140.
2. **INSURANCE.**—*Life Insurance.—Society's Constitution.—Construction.*—The terms "those left behind" and "the family," as used in a provision of a beneficial association's constitution that suicide of a member deprives such groups of death benefits, are broad enough to include the wife of a member. p. 140.
3. **APPEAL.**—*Review.—Instructions.—Failure to Include Evidence in Record.*—Where the evidence is not in the record, none of the instructions given will be held erroneous if correct under any evidence admissible under the issues. p. 141.

From LaPorte Circuit Court; *H. L. Crumpacker*, Judge.

Action by Augusta Oleske against Frank J. Piotrowski and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Cornelius R. Collins and *Jeremiah B. Collins*, for appellant.

Theron F. Miller and *W. W. Pepple*, for appellees.

NICHOLS, P. J.—The appellant sued the appellees, in the LaPorte Superior Court, in their representative capacity, as representing a voluntary association of more than 300 individuals, organized for the mutual benefit of the members thereof. The benefits paid by the society are on account of the sickness or death of its members, such benefits being paid out of the treasury of the society, and by levying an assessment on account of the death of any member. This action was brought by the appellant to collect for benefits which she alleged to be due on account of the death of her husband, Valentine Turczinski, who appellant alleged was a member of said society in good standing at the time of his death, such society being an unincorporated society and represented by the appellees. Since the death of her said husband, the appellant has remarried to one Oleske.

The complaint was in one paragraph, to which appellees answered in four paragraphs, the first being a general denial. The second amended paragraph averred in substance that appellant's husband became a member of the society, known as the "Polish Lancers, under the Protection of St. Casimer the Prince," on or about January 6, 1906. In answer to certain questions propounded to him, said husband said that he had acquainted himself with the constitution of the society, which was in the Polish language, and that he desired to submit himself to it and to the by-laws of the society. The constitution provided that each member should pay dues of twenty-five cents per month, and \$1.50 on the death of any member, and, if any member was back in paying his dues, penalties, or assessments, and if, after notification by the secretary, he failed to pay at the next nearest meeting, or failed to offer some valid excuse, he thereby lost his rights to sick or mortuary benefits. In the year 1910, the custom which the secretary had theretofore followed, of sending out notices to delinquents, was discontinued, and from May 16, 1910, to November 21, 1910, the date of the husband's death, the method provided by the constitution was followed, which method was to read at each meeting the number of members in good standing, and of those back in their payments. According to custom, this method of reading the names of those back in their payments constituted notice, and said husband knew of said method of notice, during all the time, and agreed to be governed thereby; but, notwithstanding, failed to pay his monthly dues from May 16, 1910, to November 21, 1910, and failed to pay an assessment of \$1.50 because of the death of a member

in good standing, July 20, 1910, and a like assessment because of the death of another member, September 8, 1910. On September 16, 1910, said husband received notice of his delinquency by having his name read at a regular quarterly meeting held at that time, but failed to pay or offer valid excuse, and did not pay or offer valid excuse at the next regular meeting, which was held October 17, 1910, and said husband never did make such payment of his delinquent dues and assessments, and the same were unpaid at the time of his death. Thereby said husband forfeited all his and appellant's rights to sick and mortuary benefits.

The reamended third paragraph of answer averred suicide, and that nothing was due appellant by virtue of the provision of the constitution in Polish language, which means: "The family of a member whose death was due to drunkenness or suicide is not entitled to demand any expenses from the society, and the society is not bound to take care of the funeral, and will not keep guard over the deceased." And §2: "Those who commit suicide deprive those left behind of the rights to the death benefits."

The fourth paragraph of answer averred a rule contained in the constitution in the Polish language, which means that "every member who, after being received into the society, steps out of its ranks by his own accord, thereby ejects himself from the society and has no rights to the moneys he paid into the society up to that time," and that said husband stepped out of the ranks of his own accord about May 16, 1910, and did not thereafter seek to return, and that he thereby ejected himself from the society.

Appellant filed motion to require appellees to make

their second paragraph more specific, and a like motion as to the fourth paragraph of answer. Each of these motions was overruled. There was no error in either of these rulings, as each of said paragraphs was sufficiently specific as to the matter in the motion addressed thereto.

Appellant filed a several demurrer to the second, third and fourth paragraphs of answer, in the discussion of which she contends that the in-

1. sured's failure to pay or offer some valid excuse did not terminate his contract of insurance, without some action on the part of the society; but where, as in this case, the laws governing a society are in such terms as to render them self-executing, the society need not take affirmative action against a delinquent in order to declare a forfeiture, but the right to benefits is lost immediately upon the default which by the rules constitutes the grounds of forfeiture. *Freckmann v. Supreme Council, etc.* (1897), 96 Wis. 133, 70 N. W. 1113; *Pitts v. Hartford, etc., Ins. Co.* (1895), 66 Conn. 376, 34 Atl. 95, 96, 97, 50 Am. St. 96; *Munger v. Brotherhood, etc.* (1916), 176 Iowa 291, 154 N. W. 879, 880; *Bosworth v. Western Mut. Aid Society* (1888), 75 Iowa 582, 39 N. W. 903, 904; *Lehman v. Clark* (1898), 174 Ill. 279, 51 N. E. 222, 225, 43 L. R. A. 648. Appellant contends

2. that the clause of said contract, forfeiting as to "those left behind" and as to "the family," does not include the appellant, who was the wife of the insured. We need no authorities to establish the proposition that "those left behind" is broad enough to include the wife; and that "family" includes the wife has been many times decided. *Hall v. Stephens* (1877), 65 Mo. 670, 27 Am. Rep. 302; *Bradley v. An-*

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draws (1884), 137 Mass. 50; *Cross v. Benson* (1904), 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Aultman, Miller & Co. v. Price* (1904), 68 Kan. 640, 75 Pac. 1019; *Nye v. Grand Lodge, etc.* (1893), 9 Ind. App. 131, 36 N. E. 429; *Marsh v. American Legion, etc.* (1889), 149 Mass. 512, 21 N. E. 1070, 1072, 4 L. R. A. 382; *Brooklin, etc., Relief Assn. v. Hanson* (1889), 53 Hun 149, 6 N. Y. Supp. 161; *Britton v. Royal Arcanum* (1889), 46 N. J. Eq. 102, 18 Atl. 675, 676, 19 Am. St. 376. Other objections were discussed by the appellant, but we do not deem them of such force as to justify the extending of this opinion in their consideration. The several demurrer was properly overruled.

The evidence is not in the record; therefore none of the instructions given will be held erroneous, if correct under any evidence admissible under the

3. issues. *Schuster v. State* (1912), 178 Ind. 320, 322, 99 N. E. 422; *Mankin v. Pennsylvania Co.* (1903), 160 Ind. 447, 454, 455, 67 N. E. 229; *Ferris v. State* (1901), 156 Ind. 224, 230, 59 N. E. 475; *Conden v. Morningstar* (1884), 94 Ind. 150, 151. With this rule of law before us, we have carefully examined the instructions challenged, reading them with the instructions as a whole, and we find no error in them.

The judgment is affirmed.

BEAVEN v. HAMILTON.

[No. 10,016. Filed October 9, 1919.]

1. **SALES.**—*Action for Purchase Price.—Complaint.—Sufficiency.*—
 In an action to recover the value of an ice box, complaint alleging that defendant purchased the box from plaintiff at an agreed

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price, and that said sum was due and unpaid, *held* sufficient as against the objection that it failed to allege that title passed to defendant. p. 144.

2. *APPEAL.—Review.—Harmless Error.—Overruling Demurrer to Reply.*—Where the special finding of facts shows that the judgment is not based on a certain paragraph of reply, the action of the court in overruling a demurrer to such paragraph was harmless. p. 144.
3. *APPEAL.—Presenting Questions for Review.—Correctness of Conclusions of Law.—Necessity of Taking Exceptions.*—Where no exceptions were taken below to the conclusions of law, no question as to their correctness is presented for review on appeal. p. 145.
4. *APPEAL.—Presenting Questions for Review.—Rulings on Evidence.—Necessity of Taking Exceptions.*—Where no exceptions were taken to the action of the trial court in admitting or excluding evidence, no question relating thereto can be reviewed. p. 145.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by Douglass Hamilton against Leslie M. Beaven. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

John W. Hornaday and *Ira M. Sharp*, for appellant.

A. J. Shelby, for appellee.

McMAHAN, J.—A complaint by appellee to recover the value of an ice box alleged to have been sold to appellant. It is alleged that appellant and appellee entered into a written contract on July 26, 1915, wherein it was agreed that the appellee was to open a meat market and grocery store in a certain brick storeroom, and to carry a line of groceries up to a \$500 stock, for a period of six months, rent free, unless appellee continued in business, then appellant was to receive rent for said six months at a rate of \$30 per month to apply on a certain ice box, and continue until the ice box was paid for at the rate of \$30 a month. The price of the ice box was fixed at \$300.

It was further provided in said contract that, in case appellee became dissatisfied at the expiration of six months and moved the stock out of the building, appellant would pay appellee \$300 for said ice box. It was alleged that appellee had performed his part of the contract, and demanded judgment for \$300.

Appellant filed an answer of general denial, and later filed three additional paragraphs, the third being a counterclaim, and the fourth no consideration for that part of the agreement by which appellee was to occupy the storeroom free of rent. The nature of the second paragraph is not disclosed. The third paragraph is somewhat inartistically drawn, but in substance alleged that the appellant was the owner of the storeroom mentioned in the complaint; the execution of the contract; that the storeroom had not been occupied, and it was not known whether appellee could establish a paying business in it or not; that it was agreed that, if said business was not a paying venture, the rent, instead of being paid in cash to appellant, should be credited by appellant upon the purchase of the ice box in question, which was owned by appellee; that it was the intention of the parties that, if the business carried on in said storeroom was successful, appellee was to continue to occupy said room after the expiration of the first six months at a rental of \$30 per month, but that the appellee at the expiration of said six months arbitrarily and without right moved out of said building, and refused to pay rent for the time he had occupied it; that the rent was due and unpaid, and asking judgment for \$180 for rent up to January 26, 1916.

Appellee filed a reply to the second and third paragraphs of answer, the first paragraph being special,

and the second a general denial. Appellant's demurrer to the first paragraph of reply was overruled, and exception saved. The cause was tried by the court, and the facts found specially. Judgment was rendered in favor of appellee for \$300.

The appellant filed a motion for a new trial, the specifications named being that the decision of the court (1) is not sustained by sufficient evidence; (2) is contrary to law; (3) that the court erred in admitting and (4) in excluding certain evidence. The errors assigned and not waived are that the court erred in overruling the demurrer to the first paragraph of reply; that the court erred in each conclusion of law, and in overruling the motion for a new trial.

The appellant contends that the complaint is not sufficient to constitute a cause of action, in that it is not alleged therein that the title to the ice box

1. passed to the appellant, and that the demurrer to the reply should have been carried back and sustained to the complaint. The complaint alleged that the appellant purchased the ice box from appellee at and for the agreed price of \$300, which appellant agreed to pay, and that said sum was due and unpaid. The complaint is sufficient and not open to the objections urged against it.

The special finding of facts shows that the judgment is not based upon the first paragraph of reply.

The action of the court in overruling the de-

2. murrer to the reply was therefore harmless.

Gilliland v. Jones, Exr. (1896), 144 Ind. 662, 43 N. E. 939, 55 Am. St. 210; *Beasley v. Phillips* (1898), 20 Ind. App. 182, 50 N. E. 488.

No question relative to the correctness of the conclusions of law is presented for our consideration, as

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no exception appears to have been taken to any
 3. of them. Appellant also contends that the decision of the court is not sustained by sufficient evidence, for the reason that it does not show that appellee put forth a reasonable effort to make his business a success. Although the evidence is not shown to have been brought into the record by a bill of exceptions, we have examined it as set out in appellant's brief, and it is sufficient to support the findings of the court.

The appellee calls our attention to the fact that no exceptions are shown to have been taken to the action of the court in admitting or in excluding any
 4. of the evidence, so that no error is shown in that respect.

No reversible error being shown, the judgment is affirmed.

**METROPOLITAN LIFE INSURANCE COMPANY v. WATHEN,
 GUARDIAN.**

[No. 9,936. Filed October 9, 1919.]

1. **TRIAL.—General Verdict.—Scope and Effect.**—A general verdict for plaintiff is a finding in plaintiff's favor of every material fact legitimately provable under the issues. p. 149.
2. **INSURANCE.—Life Insurance.—Action on Policy.—Representations by Insured on Application.—Insurer's Knowledge.—Evidence.**—In an action on a policy of life insurance, defended on the ground that insured was a habitual drunkard at the time he applied for the insurance, evidence held to warrant the jury in finding that the insurer had knowledge of insured's condition. p. 149.
3. **INSURANCE.—Life Insurance.—Action on Policy.—Representations in Application.—When Fraudulent.—Evidence.**—In an action on a life insurance policy, defended on the ground that insured was a habitual drunkard, evidence that insured was drunk when solicited for the insurance and that the soliciting

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agent filled out the application and the check in payment of the premium, when considered in connection with undisputed facts relative to insured's habits as to the use of intoxicants, *held* sufficient to justify the jury's finding that insured's conduct in making false answers in his application as to the use of intoxicants and the condition of his health was not fraudulent. p. 150.

4. **INSURANCE**.—*Life Insurance*.—*Avoidance of Policy*.—*Representations in Application*.—Where the acts of insured, a habitual drunkard, in obtaining a policy of insurance were not fraudulent, and the insurer's agent had knowledge of the facts that otherwise would have avoided the policy, the representations of insured that he did not use alcoholic beverages to excess and had not been treated for illness in any hospital, etc., did not invalidate it. p. 150.
5. **APPEAL**.—*Review*.—*Harmless Error*.—*Refusal of Instructions*.—The refusal of tendered instructions relating to issues not involved in the cause was harmless. p. 150.
6. **TRIAL**.—*Refusal of Instructions Covered by Other Instructions*.—It is not error to refuse requested instructions, even though correct, where they are covered by others given. p. 150.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by Margaret W. Wathen, guardian of Herman W. Wathen, against the Metropolitan Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Clarence B. Kessinger and *William H. Hill*, for appellant.

S. M. Emison, *LeRoy M. Wade* and *Arnold J. Padgett*, for appellee.

NICHOLS, P. J.—This action was in the Knox Circuit Court by the appellee against the appellant, upon a life insurance policy issued by the appellant on the life of William H. Wathen for \$2,000, and payable to appellee's ward, Herman W. Wathen, as beneficiary. The issues were a complaint, answer of two paragraphs, and a reply in denial to the second paragraph of answer.

The case was submitted to a jury for trial, which returned a verdict for appellee. After motion for a new trial was overruled, the defendant appealed. The only error assigned in this court is the error of the court in overruling appellant's motion for a new trial, under which appellant contends that the court erred in refusing to give each of four instructions tendered by appellant, each of which said instructions present the question of whether there was a proper tender by appellant to appellee upon appellant's attempted rescission of the insurance contract. No other error is presented.

The policy sued upon contains the following provisions:

"In consideration of the application for this policy a copy of which application is attached hereto and made a part hereof, and a payment of the annual premium of \$68.25 receipt of which is hereby acknowledged said policy is issued." And "It is further declared and agreed that the foregoing statements and answers and also the statements and answers to the medical examiner are correct and wholly true and that they shall form the basis of the contract of insurance if one be issued."

In his application for insurance, the insured made answers to certain questions propounded to him in writing, to the effect that he had never been an inmate or visitor of an asylum, hospital, or sanitarium for treatment; that he had no medical attendant; that the services of a medical attendant had not been required for anything; that he had not been confined to the house by illness since childhood; that he had had no

illness since childhood; that he drank an occasional glass of whisky, but that he had never used alcoholic stimulants, wine, or malt liquor, or tobacco to excess. Appellant avers by its second paragraph of answer that these statements, and each of them, were false and fraudulent, and were known to be so by the insured at the time he made them, and when he signed his application and applied for the insurance; that he was not in good health at the time he made said application, but was at the time a habitual drunkard, and had been for more than three years; that he was at said time suffering from acute alcoholism and drank alcoholic liquors to excess; that he had been under the care of a physician and confined to his home at various times during the year preceding his application with sickness caused by his excessive use of intoxicating liquors; that during the year prior to his said application he was an inmate of St. Anthony's Hospital in the city of Terre Haute, Indiana, upon three different occasions, suffering from acute alcoholism, and was confined to his bed and under the care of physicians and nurses for more than two weeks at a time, and that, in fact, he died of acute alcoholism as a result of excessive use of intoxicating liquors, within one month and twenty days from the date of his said policy of insurance, in said St. Anthony's Hospital; that said appellant relied upon said statements in said insured's application and examination, and had no knowledge of their falsity at or before the delivery of the policy, and not until after the death of the insured. Then follow averments of an offer to return the premium to the appellee as soon as she was appointed guardian, and her refusal to accept, and the payment of the same into court for the use of appellee.

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It appears by uncontradicted evidence, offered by both appellant and appellee, that prior to November 20, 1914, the date of the issue of the policy, the insured had been a habitual drunkard, and that within two years prior thereto he had been confined in hospitals and sanitariums fourteen times, suffering from acute alcoholism. On the day he made application for his insurance he had drunk between midnight and noon a quart of whisky, and then he left the house in a drunken condition. Going to a barber shop, he went in staggering, and while there the agent of the insurance company came in and solicited his insurance. When he finished shaving, he staggered over to a chair and sat down, where the insurance agent filled out his application, which he signed. He then produced a check book, in which the agent filled out the check for the amount of the premium, and he signed it. He went home drunk, and took a quart of whisky with him, and drank frequently during the night and the next morning, consuming the entire quart of whisky, and in the afternoon went to the appellant's medical examiner to be examined. Later he returned home in a drunken condition. These facts are not disputed by either party.

The jury returned a general verdict in favor of the appellee, and thereby found every material fact legitimately provable under the issues, in her

1. favor. *Cleveland, etc., R. Co. v. Harvey* (1910), 45 Ind. App. 153, 90 N. E. 318; *Keesling v. Ryan* (1882), 84 Ind. 89. This included, in addition to the foregoing undisputed facts, the further fact, denied by appellant, that appellant's soliciting agent and medical examiner both knew of the drunken condition of the insured, that he

was afflicted with acute alcoholism, that he had been under the care of a physician, and that he had repeatedly been in a hospital for treatment. In view of the foregoing statement of surrounding circumstances, we must hold that the jury was fully justified in its findings as to appellant's knowledge. Further, the undisputed statement as to the drunken condition and habits of the insured, together with

3. the fact that the soliciting agent filled out the application and the check for the payment of the premium, justified the jury's finding that
4. the insured's conduct was not fraudulent. The acts of the insured not being fraudulent, and the company's agent having knowledge of the facts that otherwise would have avoided the policy, the representations of the insured did not invalidate it. *Home v. Provident Fund Society* (1893), 7 Ind. App. 587, 34 N. E. 830; *Traders Ins. Co. v. Cassel* (1900), 24 Ind. App. 238, 56 N. E. 259; *Supreme Tribe of Ben Hur v. Lennert* (1912), 178 Ind. 122, 98 N. E. 115; *Pickel v. Phoenix Ins. Co.* (1889), 119 Ind. 291, 21 N. E. 898; 25 Cyc 803.

Having reached the conclusion that the policy was valid, the question of rescission and tender is not involved, and error, if any, in refusing to give

- 5-6. the instructions tendered was harmless. Had they been correct statements of the law as applied to this case, they were substantially covered by the instructions given by the court.

The judgment is affirmed.

BELT RAILROAD AND STOCK YARDS COMPANY v.
HAMMOND.

[No. 9,992. Filed October 9, 1919.]

1. CARRIERS.—*Carriage of Live Stock.—Failure to Unload Promptly.—Action.—Jury Questions.—Negligence.—Contributory Negligence.*—In an action against a carrier of live stock for the loss of hogs alleged to have resulted from defendant's negligent failure to promptly unload them, *held* that, in view of the record, the question of the carrier's negligence, as well as the shipper's contributory negligence in overloading the cars, was for the jury. pp. 152, 153.
2. CARRIERS.—*Carriage of Live Stock.—Negligence.—Failure to Unload Promptly.*—It is the duty of a carrier accepting live stock for shipment to unload the same at the point of destination with reasonable promptness, in view of surrounding conditions, and failure to do so is negligence. p. 153.
3. APPEAL.—*Review.—Verdict.—Conclusiveness.—Evidence.—Sufficiency.*—In a common-law action, where the parties had a constitutional right to a trial by jury, it is not within the power of the court on appeal to overturn a verdict which rests upon some evidence and is not contrary to law. p. 154.

From Marion Superior Court (94,967); *Vincent G. Clifford*, Judge.

Action by Thomas G. Hammond against the Belt Railroad and Stock Yards Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Clarence E. Weir, *Charles P. Ritter* and *Charles W. Richards*, for appellant.

Edward B. Raub and *Watson & Esarey*, for appellee.

ENLOE, J.—This action was brought by appellee against appellant to recover damages for loss of hogs killed in the car in which shipped, by reason of the alleged negligence of appellant.

The complaint was in two paragraphs, and the

negligence charged in the first paragraph of complaint was in failing to furnish the "proper number of employes and other facilities" for promptly unloading cars, and negligent delay in unloading said cars after same were delivered at switch for unloading. The second paragraph charges: "That by reason of defendant's negligence and failure to use due and reasonable diligence to promptly unload said live stock, ten of said hogs, belonging to and owned by the plaintiff, were piled upon and killed." The answer was in general denial. Trial was by a jury, which returned a verdict for appellee.

The error relied upon is the overruling of appellant's motion for a new trial.

The motion for new trial assigned three reasons therefor, viz.: (1) Verdict is not sustained by sufficient evidence; (2) verdict is contrary to law; and (3) action of the court in refusing to give the jury a peremptory instruction to find for the defendant.

Under this motion for a new trial, if the record discloses any competent evidence to sustain this verdict, upon each and every material fact necessary to sustain the action, then it necessarily follows that said verdict is not contrary to law, and that the court did not err in refusing said instruction so requested by appellant.

As to the material averments of the complaint, appellant makes no question as to their being well supported by the evidence, except as to the

1. allegations of negligence, and loss sustained as a result thereof. As to the time the cars in question were "set" at the yards of appellant, at the chutes to be unloaded, there is a conflict in the testimony. There is also a conflict in the testimony as

to the "time elapsed," after the setting of said cars, before the same were unloaded. There is testimony in the record that the stock was in good condition when delivered by initial carrier to the Indianapolis Union Railway, to be taken to the stockyards. There is also testimony that these cars were delivered at the appellant's yards at 3:10 a. m., December 3, 1913, in good condition, but, by reason of the unloading track being already full of cars, which had been placed there about midnight, and which had not been and were not unloaded until about six o'clock of that morning, the cars containing appellee's stock were necessarily held almost four hours before they could be set to be unloaded. There is also testimony in this record that men are kept, by appellant, on duty at the unloading track, at its yards, day and night, for the purpose of unloading cars of stock when they arrive, and that it takes them about thirty-five minutes to unload a cut—twenty-six cars—loaded with stock.

The record discloses a number of sharp conflicts in the testimony, and it was a question for the jury as to which of the witnesses so testifying they would believe.

It was the duty of appellant to see that these cars in question were set and unloaded with reasonable promptness, reference being had to surrounding conditions, and a failure to do so would be an act of negligence. Whether the appellant was guilty of some one or more of the

1. negligent acts complained of, whereby appellee sustained the loss complained of, was a question, upon this record, for the jury, as was also the question of contributory negligence by appellee,
- 2.

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in the matter of overloading said cars. *Hoggatt v. Evansville, etc., R. Co.* (1891), 3 Ind. App. 437, 29 N. E. 941; *Anderson v. Citizens St. R. Co.* (1894), 12 Ind. App. 194, 38 N. E. 1109.

This was a common-law action, where the parties had a constitutional right to a trial by jury, and it is not within the power of this court to overturn

3. such a verdict, where it rests upon some evidence and is not contrary to law.

The judgment is therefore affirmed.

BORN v. KING.

[No. 10,040. Filed October 10, 1919.]

APPEAL.—Review.—Verdict.—Conclusiveness.—Conflicting Evidence.

—A judgment based on conflicting evidence is conclusive on appeal.

From Marion Superior Court (104,511); *John J. Rochford*, Judge.

Action between Isaac Born and J. R. King. From a judgment for the latter, the former appeals. *Affirmed.*

Ritchey & Cronk, for appellant.

Romney L. Willson and *Russell Willson*, for appellee.

REMY, J.—The only questions which, under the rules of this court, are presented for our consideration, and which have not been waived by appellant, require for their determination a review of conflicting evidence. Under such circumstances, the judg-

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ment of the trial court is conclusive, and on the authority of *Nicholson v. Smith* (1916), 60 Ind. App. 385, 110 N. E. 1007, the judgment is affirmed.

CITIZENS NATIONAL BANK v. GILLETT.

[No. 9,860. Filed October 10, 1919.]

1. **BILLS AND NOTES.**—*Promissory Note.*—*Voluntary Execution Without Consideration.*—*Maker's Right to Equitable Relief.*—In the absence of fraud or mistake, one voluntarily executing a promissory note without consideration cannot ask a court of equity to cancel the same. p. 157.
2. **APPEAL.**—*Review.*—*Findings.*—*Conclusiveness.*—In an action to cancel a note alleged to have been procured by fraud, the trial court's finding, based upon sufficient evidence on the issue of fraud, is conclusive on appeal. p. 157.

From Spencer Circuit Court; *Emory L. Boyd*, Special Judge.

Action by Grace L. Gillett against the Citizens National Bank. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

O. W. McGinnis, Robinson & Stilwell and *Swan & Mason*, for appellant.

G. V. Menzies, John R. Brill, Frank H. Hatfield and *John W. Brady*, for appellee.

McMAHAN, J.—This action was brought by appellee against appellant to cancel a certain promissory note and mortgage given to secure the same.

The appellant filed a cross-complaint asking a judgment for the amount due on the note in question, and for the foreclosure of said mortgage. The note in question called for \$4,500, was dated December 10, 1909, payable to the order of the appellant thirty

days after date, and is the same note that was in controversy in the case of *Gillett v. Bank* (1914), 56 Ind. App. 694, 104 N. E. 775, where the facts connected with its execution are substantially stated and need not be here repeated.

The appellant in the case just referred to secured a judgment in the trial court for the amount of the note, and a decree foreclosing the mortgage, from which appellee appealed. The cause was reversed by this court in March, 1914. In March, 1915, appellant dismissed its said action, and appellee thereafter filed her complaint as above stated to cancel said note and mortgage.

The appellee in her complaint alleged that the note was given without consideration, and was procured from her by fraud. The cause being at issue, was tried by the court, and resulted in a decree adjudging the note and mortgage void, and that they should be canceled and the mortgage satisfied of record. From this decree appellant appeals and insists that the finding of the court is not sustained by the evidence.

Appellee contends that this is the second appeal from a judgment settling the same controversy between the same parties, and that the decision of the court on the former appeal is the law of the case and binding upon the court in this appeal.

In view of the conclusions which we have reached, it is not necessary for us to pass upon this question. We are satisfied with the law as there declared by the court, and, in so far as the same is applicable, we accept it as authority in this appeal, not necessarily because it is "the law of the case," but because it states the law correctly. As to when the law of the case is applicable, see *Hawley, Admr., v. Smith*,

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Admr. (1873), 45 Ind. 183; *Board, etc. v. Bonebrake* (1896), 146 Ind. 311, 45 N. E. 470; *James v. Lake Erie, etc., R. Co.* (1897), 148 Ind. 615, 48 N. E. 222; *Westfall v. Wait* (1905), 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788; *Alerding v. Allison* (1908), 170 Ind. 252, 83 N. E. 1006, 127 Am. St. 363.

In the first case the appellee, as a defendant, defended and raised the question of validity of the note, on the grounds of suretyship and want of consideration; while, in the instant case, she is the plaintiff, seeking equitable relief on the grounds of suretyship, want of consideration, and fraud in the procuring of her signature to the note in question.

It is true, as stated by appellant, that one may not in the absence of fraud or mistake voluntarily execute a promissory note without consideration and 1-2. then ask a court of equity to cancel the note, but the appellee in her complaint alleges fraud in the procurement of the note. The trial court found in her favor upon that issue, and there is sufficient evidence to support that finding. This being true, there is no available error in the record.

Judgment affirmed.

C. H. MALONEY AND COMPANY v. WHITNEY ET AL.

[No. 9,989. Filed October 14, 1919.]

1. **APPEAL.—Review.—Amendment to Complaint.—Presumption.—**

Where the record on appeal shows that appellant objected to the amendment of the complaint, but made no application for a continuance, offered no additional evidence, and made no showing that it was in any way prejudiced thereby, the court on appeal will presume that the amendment was authorized in the furtherance of justice under §§400, 405 Burns 1914, §§391, 396 R. S. 1881. p. 159.

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2. PLEADING.—*Amendment.—Discretion of Court.*—The permitting of amendments to pleadings so as to make them conform to the facts proved is a matter largely within the discretion of the trial court. p. 160.
3. APPEAL.—*Review.—Permitting Amendments to Pleadings.—Discretion of Trial Court.*—It is only where the trial court has abused its discretion in allowing amendments to pleadings that a cause will be reversed by reason thereof. p. 160.
4. PLEADING.—*Complaint.—Amendment Before Judgment.—Discretion of Trial Court.*—In an action to recover for building materials and on an open account, the trial court did not abuse its discretion in allowing plaintiffs, before judgment was rendered, to amend the complaint to make it include items previously claimed by them to have been paid, out which the court, in another case between the same parties being tried at the same time, held had not been paid. p. 160.

From Porter Circuit Court; *H. H. Loring*, Judge.

Actions by Hugh E. Whitney and another against C. H. Maloney and Company. From a judgment for plaintiffs in one action, the defendant appeals. *Affirmed.*

Sheehan & Syddick, for appellant.

H. F. McCracken and *Kenneth Call*, for appellees.

REMY, J.—Appellees Whitney and Ford were the plaintiffs, and appellant was a defendant in each of two suits commenced in the Porter Circuit Court, and by agreement of the parties tried at the same time. One of the cases, known in the trial court as No. 2634, was instituted as an ordinary suit to foreclose a mechanic's lien on property known as Mercy Hospital, and to recover on an open account for material furnished by Whitney and Ford for use in the construction of that work. In the other case, which serves as the basis of this appeal, and in the trial court was cause No. 2635, recovery was sought for material used by appellant in work on the Hobart Library, and for an additional open account.

At the trial, the accounts between the parties were examined in detail, and it appears from the evidence that on November 10, 1914, appellant paid to Whitney and Ford the sum of \$800, which the latter claimed to have applied in payment of certain miscellaneous items of open account, introduced in evidence, but which had no connection with either Mercy Hospital or the Hobart Library job. It further appears from the evidence, and the trial court held, that Whitney and Ford had not applied the payment of \$800 on the miscellaneous items, but had applied \$631 of that payment on the Mercy Hospital account. For that reason, in rendering its judgment in cause No. 2634, the trial court declined to foreclose for the full amount of the lien therein sought to be established. Thereupon, before judgment was rendered in cause No. 2635, Whitney and Ford moved to amend their complaint in that case so as to include the miscellaneous items previously claimed by them to have been paid, and to increase their demand accordingly. This motion was sustained, and, on the complaint as amended, judgment was rendered for an amount in excess of the original demand.

Errors assigned are: (1) The action of the court in authorizing the amendment of the complaint; and (2) the overruling of the motion for a new trial. The only reason for a new trial presented is that the evidence is not sufficient to sustain the finding.

The record shows that appellant objected to the amendment of the complaint, but made no application for a continuance, offered no additional

1. evidence, and made no showing that it was in any way prejudiced thereby. Under such circumstances this court will presume that the amend-

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ment was authorized in "the furtherance of justice." *Burns v. Fox* (1888), 113 Ind. 205, 14 N. E. 451; *Town of Martinsville v. Shirley* (1882), 84 Ind. 546; *Smith, etc., Corp. v. Byers* (1898), 20 Ind. App. 51, 49 N. E. 177; §§400, 405 *Burns* 1914, §§391, 396 R. S. 1881.

The permitting of amendments to pleadings 2-4. so as to conform them to the facts proved is largely a matter within the discretion of the trial court. It is only where there has been an abuse of such discretion that a cause will be reversed on appeal. *Case v. Moorman* (1900), 25 Ind. App. 293, 58 N. E. 85. There is nothing in the record to show that the rights of appellant were prejudiced. The court did not abuse its discretion. There was no error in permitting the amendment.

The finding of the court is fully sustained by the evidence. Judgment affirmed.

STATE OF INDIANA, EX REL. DAVIDSON, CONSTRUCTION
COMMISSIONER, ET AL. v. ALLEN ET AL.

[No. 9,904. Filed October 14, 1919.]

1. DRAINS.—*Assessments.—Collection.—Action to Enjoin.—Parties.—Drainage Commissioner.—Statute.*—Under §6144 *Burns* 1914, Acts 1907 p. 508, a commissioner appointed by the court to complete the construction of a drainage ditch after the work had been abandoned by the contractor was neither a necessary nor a proper party to landowner's action to restrain the enforcement of the collection of assessments. p. 166.
2. INJUNCTION.—*Enjoining Collection of Drainage Assessments.—Intervention by Construction Commissioner.—Right to Expenses.—Statute.*—As a commissioner in charge of construction of drainage ditch is neither a necessary nor a proper party, under §6144 *Burns* 1914, Acts 1907 p. 508, to owner's action to restrain the enforcement of the collection of assessments, where the com-

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missioner intervened to defend such action he was not entitled to recover his expenses of the litigation in an action on the injunction bond. p. 168.

3. **APPEAL.—Review.—Harmless Error.—Failure to Make Unnecessary Findings.**—In an action by a commissioner in charge of the construction of a drainage ditch to recover on an injunction bond his expenses of litigation incurred in defending a suit by landowners to restrain collection of assessments, in which he intervened, the court's failure to find the amounts allowed and paid out by him as such expenses was harmless, since, being an unnecessary and an improper party to the owners' action under §6144 Burns 1914, Acts 1907 p. 508, he was not entitled to recover such expenses. p. 168.
4. **INJUNCTION.—Restraining Collection of Drainage Assessments.—Action on Injunction Bond.—Rights of Contractor.**—As a drainage contractor and subcontractor have an interest in the collection of assessments to pay the cost of a drainage ditch they are constructing, they were proper parties to a suit by landowners to enjoin the collection of assessments, and were entitled to recover, under proper allegation and proof, on the injunction bond executed by such owners for the payment of all damages and costs which might accrue by reason of the restraining order secured by them. p. 168.
5. **INJUNCTION.—Action on Injunction Bond.—Right of Recovery.—Failure to Plead Damages.**—A drainage contractor, who intervened in a suit by landowners to restrain the collection of drainage assessments, could not recover expenses incurred in attending the trial thereof in an action on the bond given by such landowners upon the making of the restraining order, where such expenses were not pleaded. p. 169.
6. **APPEAL.—Harmless Error.—Failure to Make Immaterial Finding.**—The failure of the trial court to make a finding which would not affect the correctness of the conclusion of law stated cannot be made the basis of reversible error. p. 169.

From Fulton Circuit Court; *Smith N. Stevens*, Judge.

Action by the State of Indiana, on the relation of A. Clinton Davidson, construction commissioner, and others, against Charles C. Allen and others. From a judgment for defendants, the relators appeal. *Affirmed.*

Holman, Bernetha & Bryant and James H. Bibler,
for appellants.

P. M. Buchanan and C. C. Campbell, for appellees.

BATMAN, C. J.—This is an action by appellant against appellees on two bonds, executed by appellees in an action commenced by them in the Fulton Circuit Court, to restrain the treasurer of Fulton county, Indiana, from selling the several tracts of land belonging to appellees at the tax sales in said county in the years 1909 and 1911, upon a second assessment for the construction of what is known as the James A. Gault ditch. So much of the complaint as is necessary for an understanding of the questions presented and determined by this appeal is as follows: That on February 20, 1902, James A. Gault and others filed their petition in the auditor's office of Cass county, Indiana, to establish and construct a public ditch in the counties of Cass, Fulton, Pulaski and White; that such proceedings were had on said petition that said ditch was established, assessments of benefits made, and construction begun under a contract therefor; that thereafter, before the completion of said ditch, the contractor for said work wholly abandoned the same, and his contract therefor was forfeited; that subsequently, on a proper petition, the relator, A. Clinton Davidson, was appointed a commissioner to take charge of and complete the construction of said ditch; that said commissioner, after having duly qualified, was ordered by the Pulaski Circuit Court to collect the unpaid balance of assessed benefits against the land affected by said ditch; that the lands of appellees, other than Hendrickson and DuBois, were severally assessed for benefits on account of said ditch; that said appellees

neglected and refused to pay their said assessments, and the same were duly certified to the auditor of Fulton county, Indiana, and by him placed on the delinquent tax duplicate, and certified to the treasurer of said county for collection, as other delinquent taxes are collected; that said treasurer advertised the several tracts of land of the appellees, so assessed, for sale on February 8, 1909; that prior to said sale appellees, other than Hendrickson and DuBois, brought an action in the Fulton Circuit Court to enjoin said county treasurer from selling their said lands for the collection of said ditch assessments; that to procure a temporary restraining order in said cause appellees executed their written undertaking with the above-named appellees as sureties thereon, which was duly approved, conditioned for the payment of all damages and costs which might accrue by reason of such order; that thereupon the court granted the restraining order prayed, whereby the treasurer of said Fulton county was restrained from selling the said several parcels of land of appellees, and prevented from enforcing the collection of said assessments; that afterwards and before the termination of said action the terms of office of John H. Pyle, who was the treasurer of said county and the defendant in said action, expired, and one Frank R. McCarter succeeded him as such officer; that thereupon appellees, other than Hendrickson and DuBois, filed an amended complaint in said cause making the said McCarter, as such treasurer, defendant in said action; that the relators Myron D. Spencer, David H. Yoeman, and A. Clinton Davidson, were by the court, on their petition, permitted to intervene as defendants in said action; that appellees, other than

Hendrickson and DuBois, applied for a temporary injunction in said action against all the defendants therein and to procure the same executed their written undertaking, with the above-named appellees as sureties thereon, which was duly approved, conditioned for the payment of all damages and costs which might accrue by reason of such order; that the treasurer of said county and the relators herein were thereupon restrained by an order of court from enforcing the collection of said assessments until June 21, 1913, when judgment was rendered in their favor in said cause, and said temporary injunction was dissolved; that the relator A. Clinton Davidson, soon after his appointment as construction commissioner in said ditch proceedings, let the contract for the construction of said ditch to the relator Myron D. Spencer, who sublet the same to the relator David H. Yoeman; that the latter entered upon the construction of said ditch, and fully completed the same to the satisfaction of said commissioner; that by reason of said restraining order and temporary injunction the relators were unable to collect the money due from appellees herein for more than five years, and as a consequence said contractors were put to a large amount of expense and unavoidable trouble in connection with said work, and were compelled to, and did borrow large sums of money, at a high rate of interest, in order to pay the workmen employed in the construction of said ditch, and complete the same as required by their contract; that said relator A. Clinton Davidson, as such construction commissioner, by reason of said restraining order and temporary injunction, was put to large expense in defending said action; that he was compelled to employ attorneys

for such purpose, and as such commissioner did employ George W. Holman and James H. Bibler to defend said action; that they rendered valuable legal services therein during a period of more than four years, which were reasonably worth the sum of \$1,000; that no part of the damages sustained by the relators by reason of said restraining order and temporary injunction have been paid, and that the same are now due. Demand for judgment in the sum of \$3,000. Copies of the undertakings referred to in the complaint were made parts thereof as exhibits. Appellees filed an answer in two paragraphs, the first being a general denial, and the second a plea of payment. Appellant filed a reply in general denial to said second paragraph of answer. A trial was had by the court, and, on a special finding of facts made at the request of the parties, the court stated as a conclusion of law that relators take nothing by their complaint, and that they pay the costs. Appellant filed a motion for a new trial, which was overruled, and thereupon judgment was rendered in favor of appellees. Appellant is now prosecuting this appeal, and alleges in its assignment of errors that the court erred in overruling its motion for a new trial, and its conclusion of law on the special finding of facts.

The reasons alleged by appellant in its motion for a new trial, as ground therefor, are in effect that the decision of the court is not sustained by sufficient evidence and is contrary to law. Appellant in its brief bases its contention that the court erred in overruling its motion for a new trial solely on the ground that the court failed to find the amount allowed by the Pulaski Circuit Court to the attorneys

employed by the relator Davidson to defend said injunction suit, the amounts expended by the relators Davidson and Yoeman in the trial of said cause, and the amount due and owing the latter for constructing said ditch, although the undisputed evidence established such amounts. A determination of this question leads us to inquire whether the relators were proper parties to the injunction proceedings, and entitled to recover in an action on the bonds in suit.

We will first direct our inquiry to the relator Davidson. Said relator bases his right to defend in the injunction suit in question on the ground

1. that he was the commissioner charged with the construction of said ditch, and as such it was his duty to appear in said suit, and assist in protecting the fund provided for that purpose. The duties of said relator, as such commissioner, are fixed by the provisions of §6144 Burns 1914, Acts 1907 p. 508. This section provides, among other things, as follows: "He (the commissioner) shall collect the assessments not satisfied, as herein provided for, or such part thereof as may be by him deemed necessary for the purposes herein mentioned, and apply the same as herein provided, and for the purpose of making such collections, if not paid as above required, he shall make his certificate, showing the amount of such assessments against any tract or tracts of land, the default in its payment as required, and file the same with the auditor of the county where such lands are situated, and thereupon the auditor shall place the same on the delinquent tax duplicate, and the same shall be collected as other delinquent state and county taxes are collected." This provision clearly fixes the duty of said relator

with reference to the collection of the assessments in question. When he had made his certificate and filed it with the auditor of Fulton county, his duties with reference to such unpaid assessments were at an end, until they reached his hands through the process of collection provided by statute. By virtue of the foregoing provision the further duties with reference to the collection of such assessments devolved on the auditor and treasurer of said county as therein provided. But appellant contends in effect that, inasmuch as said relator was charged with the construction of the ditch in question, and was the custodian of the fund provided for the payment of such construction and certain incidental cost connected therewith, and that the action in which the bonds in suit were given was an attempt to deplete said fund, it was the duty of the relator to appear and defend the same. We cannot concur in this contention. The duties of said relator are purely statutory. The act providing for his appointment and fixing his duties as such commissioner does not give him general power to maintain actions with reference to the construction of work and collection of assessments therein provided, but only provides that he may maintain an action on any defaulting contractor's bond "to recover any increase cost, expense or damage of or to the work by reason of such failure of such contractor, and the amount recovered shall be and become a part of the funds in the hands of such superintendent for the construction of such work, the same as assessments." §6144 Burns 1914, *supra*. It has been held in effect that without this provision in the statute a commissioner, such as the relator in this case, would not have the right to maintain an action

on a defaulting contractor's bond, as he is not a trustee of an express trust within the meaning of §252 Burns 1914. *State, ex rel. v. Frantz* (1914), 181 Ind. 316, 103 N. E. 833. For the reasons stated, we conclude that the acts of said relator Davidson in becoming a party to and in defending said injunction suit were unauthorized, and hence he was neither a necessary nor a proper party to such proceedings.

This being true, any failure on the part of the court to find the amounts allowed and paid out by him, as such commissioner, for services of at-

2. torneys and expenses in defending said injunction proceedings, was harmless, as the conclusion of law stated would be correct as to said
3. relator, even if said facts had been found.

Elliott v. Pontius (1894), 136 Ind. 641, 35 N. E. 562, 36 N. E. 421.

Appellant contends that, inasmuch as the treasurer of Fulton county was charged with the collection of the unpaid assessment, neither of the

4. other relators was a necessary or a proper party to the injunction proceedings in question, and hence are not entitled to recover in an action on the bonds in suit. It appears that the relators Spencer and Yoeman were contractor and subcontractor respectively, under the relator Davidson, for the final construction of said ditch. As such they would have an interest in the assessments made to pay for its construction, and hence would have an interest in their collection. Following the rule laid down in the case of *Sheets v. Hays* (1905), 36 Ind. App. 106, 75 N. E. 20, we hold that they were proper parties defendant in said injunction proceedings, and entitled to recover in this action, if proper facts have been

alleged and proved. The special finding of facts does not show that the relator Spencer sustained any damage by reason of said restraining orders, and appellant does not claim that there is any evidence to that effect.

It is claimed, however, that there is undisputed evidence that the relator Yoeman sustained damages

in the sum of \$38.50 on account of expenses
5. incurred in attending the trial of said injunction suit. But appellant cannot base error on the action of the court in failing to find such fact, as the complaint fails to allege that said relator incurred any such expense, or sustained any damage by reason of the trial of said cause. *Woodward v. Mitchell* (1895), 140 Ind. 406, 39 N. E. 437; *Citizens' Nat. Bank, etc. v. Judy* (1896), 146 Ind. 322, 43 N. E. 259.

Appellant also complains of the action of the court in failing to find the amount shown by the evidence to be due the relator Yoeman on his contract

6. for constructing said ditch, but this cannot be made the basis of reversible error, since the conclusion of law stated would still be correct if such fact had been found. For the reasons stated, we conclude the court did not err in overruling appellant's motion for a new trial.

The only remaining error assigned by the appellant is that the court erred in its conclusion of law on the facts found. The special finding of facts, in the main, follows the allegations of the complaint, except that there is no finding as to any expenses incurred or damages sustained by any of the relators, by reason of either of the restraining orders alleged, or the amount remaining due the relator Yoeman

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for the construction of said ditch. Under this state of the findings the conclusion of law in favor of appellees is correct. We find no error in the record. Judgment affirmed.

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ROE v. JEWEL TEA COMPANY.

[No. 10,590. Filed October 15, 1919.]

APPEAL.—Vacation Appeal.—Failure to Perfect.—Dismissal.—Where, in an attempted vacation appeal from a judgment in favor of a foreign corporation, notice of the appeal was served only on the keeper of a livery stable in which a horse and wagon belonging to appellee were kept, though appellee had filed with the secretary of state its certificate appointing an agent for service of process, and the steps required by the statute to perfect a vacation appeal, where no statutory notice is given below, not having been taken, the court on appeal is without jurisdiction over appellee and its motion to dismiss must be sustained.

From Morgan Circuit Court; *Alfred M. Bain*, Judge.

Action by Curtis J. Roe against the Jewel Tea Company. From a judgment for defendant, the plaintiff appeals. *Appeal dismissed.*

J. E. Sedwick and *Joseph W. Williams*, for appellant.

E. F. Branch, for appellee.

PER CURIAM.—This is an attempted vacation appeal. There was no notice served below. The transcript was filed in the office of the clerk of this court June 18, 1919, and, at the request of appellant's attorneys, notice of this appeal was duly issued by the clerk of this court to "The Jewel Tea Company," to Morgan county, Indiana. This notice, as appears

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by this record, was served upon one Ora A. Hite, the keeper of a livery stable in Martinsville, in which stable a horse and wagon belonging to appellee were usually kept.

It further appears by this record that appellee is a nonresident corporation. The appellant in his complaint, as plaintiff in the court below, alleged that it was "a corporation organized under the laws of the State of Illinois." It further appears that the appellee, long before the bringing of this suit, had filed in the office of the secretary of state its certificate of appointment, appointing one William P. Herod as its agent in Indiana, upon whom process might be served, and that he was still such agent at the time of the attempted taking of this appeal, but no notice of any kind was ever served upon him, as such agent, with reference to this appeal. There was no notice to the defendant by any publication, as authorized by statute.

Upon this state of the record, appellee has entered a special appearance and moves to dismiss this appeal.

The steps required by the statute to perfect vacation appeals, where no notice is given below, as authorized by statute, have not been taken in this case, and, as we have no jurisdiction over the appellee, the motion to dismiss must be sustained. *Antioch Baptist Church v. Morton* (1913), 52 Ind. App. 546, 100 N. E. 874.

The appeal is therefore dismissed.

LOVELAND ET AL. v. MCCORMICK ET AL.

[No. 9,943. Filed October 15, 1919.]

1. **APPEAL.—Questions Reviewable.—Ruling on Motion for New Trial.—Failure to Incorporate Evidence in Record.**—Where each of the questions presented by the motion for a new trial requires a consideration of the evidence and it is not in the record, no question is presented relative to the ruling on the motion. p. 175.
2. **PLEADING.—Counterclaim.**—In an action on promissory notes given for the purchase price of a piano and the use of a copy-righted scheme to increase the sales of defendants, who were merchants, paragraphs of answer setting up that sales were not increased as guaranteed by plaintiffs held to state a counterclaim and not a defense. p. 175.
3. **PLEADING.—Demurrer to Counterclaim.—Form and Requisites.**—A demurrer to paragraphs of answer stating a counterclaim on the ground "that neither of said paragraphs state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated therein" is insufficient, since a demurrer to a counterclaim for want of facts should take the same form as a demurrer to a complaint on that ground, which is, under the statute, that the complaint does not state facts sufficient to constitute a cause of action. p. 175.
4. **APPEAL.—Briefs.—Waiver of Error.**—Error in overruling a demurrer to paragraphs of answer is waived by appellants' failure to make any point or state propositions in support thereof in their brief. p. 175.

From Benton Circuit Court; *Burton B. Berry*, Judge.

Action by Theodore O. Loveland and another against James McCormick and another in which defendants filed counterclaim. From a judgment against plaintiffs and in favor of defendants on their counterclaim, the plaintiffs appeal. *Affirmed.*

T. B. Cunningham and *Ernest Merrick Hawkins*, for appellants.

Daniel Fraser and *Will Isham*, for appellees.

McMAHAN, J.—The appellants began this action against appellees to recover judgment on two promissory notes each calling for \$70.

The appellees filed an answer in four paragraphs. The first was a general denial; the second was an answer of no consideration.

The third paragraph alleged that the consideration failed, in that appellees, at and before the execution of the notes sued on, had been engaged for many years as merchants; that their gross annual sales amounted to \$28,000, and that appellants warranted that, if appellees would purchase a piano from appellants, appellants would organize a scheme and plan to increase appellees' sales, and that they would increase appellees' sales to \$38,000 for the year ensuing and following the date of said notes; that appellants in writing guaranteed that, in the event they did not show an increase in appellees' sales, they would pay appellees the sum of \$400, which was the total amount appellees agreed to pay appellants for said piano and scheme to increase their sales, a copy of which written guaranty was filed with and made a part of said third paragraph of answer; that appellants failed to increase appellees' sales and to advise and assist appellees to increase their sales, and demanding judgment for \$400.

The fourth paragraph of answer alleged that the appellants sold a piano and other personal property and the use of a copyrighted scheme to increase their sales as merchants, and, in order to induce appellees to make said purchase, and to execute said notes sued on, the appellants agreed to furnish appellees a skilful and accomplished salesman to put said scheme in operation, and to advise appellees in

what manner to operate said scheme; that appellants further agreed that, unless the sales of appellees were increased \$10,000 during the following year, appellants would pay appellees whatever the difference was between 1 1/19 per cent. of the increase of sales and \$400. It is also alleged that appellees' sales were not increased during said year; that appellants did not furnish advice or assistance, and that the said scheme was of no value, although represented to be of great value; that appellees relied upon appellants' said statements and promise, and so relying in good faith paid appellants the sum of \$260; that appellants' representations were by appellants known to be false, and were intended to cheat and defraud appellees; that appellants took the full year to perform their part of said agreement, and that appellees, relying upon appellants' agreement until the end of the year, did not repudiate or rescind said contract within said year.

Wherefore appellees demanded judgment in the sum of \$260 and the cancellation of the notes sued on.

The appellants filed a demurrer to said third and fourth paragraphs of answer on the grounds: (1) "That neither of said paragraphs state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated therein;" (2) that each paragraph shows several causes of action improperly joined. A memorandum was filed containing ten specifications wherein it was claimed that each of said paragraphs was insufficient. The demurrer was overruled as to each of said paragraphs. The cause was tried by a jury, and resulted in a verdict and judgment against appellants on their complaint and in favor of appellees on their counter-

claim in the sum of \$30. Appellants filed a motion for a new trial, but it does not appear to have been

1. ruled upon or that any exception was saved.

Each question presented by the motion for a new trial requires a consideration of the evidence which does not appear to be in the record, so no question is presented relative to the ruling on the motion for a new trial.

The appellant contends that the court erred in overruling their demurrer to the third and fourth paragraphs of answer. The appellees call our

2. attention to the form of the demurrer, and insist the demurrer is not in proper form to present any question. Appellees insist that

3. the said two paragraphs are both counterclaims, and that a demurrer to a counterclaim must take the same form as a demurrer to a complaint. The statutory form for a demurrer to a complaint for want of facts is that it does not state facts sufficient to constitute a cause of action. The facts pleaded in said two paragraphs are not pleaded as a defense, but as a counterclaim, and on authority of

Duffy v. England (1911), 176 Ind. 575, 96 N. E.

4. 704, we hold that the first ground of demurrer is not well taken as to either paragraph to which it is addressed. The second ground of demurrer is waived by reason of failure to make any point or state any proposition in support thereof.

No error appearing in the record, judgment is affirmed.

NORDYKE AND MARMON COMPANY ET AL. v. SWIFT ET AL.

[No. 10,491. Filed May 27, 1919. Rehearing denied
October 16, 1919.]

1. EVIDENCE.—*Resolutions.—Scope.*—The scope of a resolution cannot be enlarged beyond what reasonably appears from its context, even by a member of the adopting body. p. 180.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Disobedience of Orders by Workman.—Acquiescence.—Effect.*—Where an employer acquiesced in the violation of an order as to the means to be used by employes in doing certain work, the order was thereby nullified. p. 181.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings by Industrial Board.—Inferences.*—In proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the Industrial Board, in determining what its finding should be is authorized to draw reasonable inferences from the facts established and the circumstances shown by the evidence. p. 181.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—"Accident Arising Out of and in Course of Employment."—Construction.*—The words, "by accident arising out of and in the course of the employment," as used in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, should be given a broad and liberal construction to effectuate the humane purposes of the act. p. 182.
5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Accident Arising Out of and in Course of Employment.—Deviation from Custom.—Presumption.*—Where a janitor was killed by a charged wire while preparing to procure gasoline with which to clean floors, the accident resulting in death arose out of and in the course of the employment within the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, even though he was deviating from the usual custom by arranging to use clean gasoline instead of dirty gasoline, it being presumed, in the absence of a finding to the contrary, that deceased was exercising a reasonable discretion in the discharge of his duties under the circumstances. p. 183.
6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Scope.—Construction.*—The Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, does not limit compensation to cases where an injury is received by an employe

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while he is performing his work in the usual and customary manner or in the way he was directed and an employe who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself, or his dependents, of a right to compensation, if injured while so engaged. p. 184.

7. **MASTER AND SERVANT.—Workmen's Compensation Act.—Accident Arising in the Course of Employment.**—An employe may be said to receive an injury by accident arising in the course of his employment, within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, when it occurs within the period of the employment, at a place where he may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment. p. 185.

8. **MASTER AND SERVANT.—Workmen's Compensation Act.—Accident Arising in Course of Employment.—Duties Within Employment.**—Where a janitor, who customarily used dirty gasoline to clean factory floors, was electrocuted while preparing to obtain clean gasoline for that purpose, the act of procuring clean gasoline, even if it had never previously been used to clean the floors, was the performance of an act reasonably connected with the janitor's work, and this would be true although decedent, in attempting to procure clean gasoline, was disobeying an order theretofore given him, such disobedience bearing not on the question whether decedent's injury was received by accident arising out of and in the course of his employment, but only on the question of wilful misconduct. p. 185.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Grace E. Swift and others against the Nordyke and Marmon Company and another. From an award for applicant, the defendants appeal. *Affirmed.*

Joseph W. Hutchinson, for appellants.

White & Jones, for appellees.

BATMAN, C. J.—The record in this case discloses that appellees are the widow and children of one

George E. Swift, deceased, who met his death while in the employ of appellant Nordyke and Marmon Company. Appellees, on September 28, 1918, filed with the Industrial Board of Indiana an application for the adjustment of their claim for compensation. Appellants appeared thereto and joined issues thereon. After a hearing and an award by a single member of the board, and a review thereof by the full board, a finding was made, which contained, among others, the following facts: That on September 5, 1918, George E. Swift was in the employ of appellant company as a janitor foreman; that for several months prior to said date there were thirty-five or forty employes of said company in the janitor force, who worked under the said George E. Swift, and were subject to his orders; that for the purpose of cleaning the floors, and especially the aisles in the buildings of said company, the force of janitors had been in the habit of using dirty gasoline, that is, gasoline that had been used for the purpose of cleaning machines; that on said date, while the said George E. Swift was preparing to procure clean gasoline with which to clean the floors in the buildings of said company by drawing the same from a tank containing 30,000 gallons, he took hold of an electric wire for the purpose of attaching it to a bucket with which to draw gasoline from said tank; that he accidentally took hold of a socket attached to said wire, thereby receiving an electric shock, which caused his death on said date; that about the middle of July, 1918, some officer of the United States Government had called the attention of the company to the fact that it was desirable to conserve the supply of gasoline, and requested that its use be discontinued for all

unnecessary purposes; that soon thereafter an organization in the plant of said company, known as the "fire board," passed a resolution requesting a discontinuance of the promiscuous use of gasoline, and issued a written order to that effect, but the evidence does not show that the written order was ever called to the attention of said George E. Swift; that the order was made for the purpose of conserving the supply of gasoline, and not as a safety measure; that the janitor force did not discontinue the use of gasoline for the purpose of cleaning the floors after the passage of said resolution by the fire board until after the death of said George E. Swift, but the evidence does not show whether clean gasoline had ever been used by said George E. Swift and the janitors working under him on any previous occasion. There is also a finding: "That his (Swift's) attention was verbally called to the fact of the request of the federal government by at least two representatives of the defendant company, and one representative of the defendant company had suggested to him on one occasion that the use of gasoline for the purpose of cleaning the floors should be discontinued * * * that the evidence does not show that the defendant company ever took any steps to require the discontinuance of its use for that purpose." On the facts found the full board made an award in favor of appellees, from which this appeal is prosecuted.

Appellants contend that the evidence is not sufficient to sustain that part of the finding quoted above. In support of this contention they cite the adoption of the resolution by the fire board, and the statements made to the decedent with reference thereto, by two other members of appellant company, O'Hara and

Hardwick, whereby it is claimed that the decedent was directed to discontinue the use of gasoline in cleaning floors, instead of being given a mere suggestion in that regard. The evidence with reference to the adoption of the resolution by the fire board tends to show that it merely provided that the promiscuous use of gasoline should not continue; that it was adopted for the purpose of conserving gasoline in pursuance of a suggestion from the United States government, and not as a safety measure. There is no evidence that the use of gasoline for cleaning floors was mentioned therein, or that it was intended thereby to prohibit its use for such purpose. In fact, it would be reasonable to infer the contrary, in view of the fact that the gasoline used for such purpose was gasoline which had been previously used in cleaning machines and had thereby become dirty. Under these circumstances it is not reasonable to presume that the conservation of such gasoline was covered either by the suggestion of the government or the resolution of the fire board adopted in pursuance thereof. It appears from the evidence that, after the adoption of said resolution, the employes named above made certain statements to the decedent with reference thereto, and to the use of gasoline for cleaning floors. Any statement made by said O'Hara may be disregarded in this connection, as the uncontradicted evidence shows that he had no control over the decedent, or his work in cleaning the floors and that the decedent was in no way bound by what he may have said about the use of gasoline for that purpose. As to the employe Hardwick the evidence shows that he was a member of the fire board,

1. but this fact is not significant, as it is apparent that the scope of a resolution cannot be en-

larged beyond what reasonably appears from its context, even by a member of the adopting body. The evidence tends to show that this witness had only a divided supervision over the decedent, but whether his supervision included the work of cleaning floors does not appear. However, the Industrial Board may have believed, as the evidence tends to prove, that in what he said to the decedent about the use of gasoline he was only attempting to communicate to him the contents of the resolution adopted by the fire board, and did not intend thereby to give him an independent order with reference to the use of gasoline. But even if it could be said that he

2. had authority over the decedent, with respect to the use of gasoline in cleaning the floors, and that his statements to him with reference thereto should be construed as an order in that regard, there is evidence of facts from which it may be reasonably inferred that appellant company knew that it was not being obeyed, and had acquiesced in its violation, which, under the law, would have the effect of nullifying the same. In determining what its finding should be, the Industrial Board had all the evidence before it, and was authorized to draw

3. reasonable inferences from the facts established and the circumstances shown thereby. *Haskell, etc., Car Co. v. Brown* (1918), 67 Ind. App. 178, 117 N. E. 555. It reached the conclusion stated above on the question under consideration, and on the facts and circumstances shown by the evidence we cannot say there was error in so doing.

Appellants also contend that the finding of facts is not sufficient to sustain the award. They base this contention chiefly on the fact that the special finding

shows that prior to the time the decedent was injured, it has been the custom to use dirty gasoline in cleaning the floors; that on the occasion in question the decedent was preparing to draw clean gasoline from a large tank for that purpose; that in making said preparation he secured an electric wire, which he intended to attach to a bucket for the purpose of drawing the gasoline from the tank; that the wire was charged, and he accidentally took hold of the socket, whereby he received an electric shock which caused his death. They insist that these facts, when taken in connection with the further finding that the evidence does not show whether or not the decedent, and the janitors working under him, had ever used clean gasoline on any previous occasion, disclose that the accident which caused the decedent's injuries did not arise out of and in the course of his employment, and hence the appellees are not entitled to an award.

This court is committed to the doctrine that

4. the words "by accident arising out of and in the course of the employment," as used in the Workmen's Compensation Act of this state, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, should be given a broad and liberal construction in order that the humane purpose for which it was enacted may be realized. *Holland, etc., Sugar Co. v. Shraluka* (1917), 64 Ind. App. 545, 116 N. E. 330; *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276. It has been said that, in order for an accident to arise out of and in course of the employment, it must result from a risk reasonably incident thereto; that the words "out of" refer to the cause of the accident, while the words "in the course of," to the time, place and circumstances under which the accident

takes place; that the former words are descriptive of the character or quality of the accident, while the latter words relate to the circumstances under which an accident of that character or quality takes place. A quotation containing this statement, in substance, was cited with approval in the case of *Haskell, etc., Car Co. v. Brown, supra*. The difficulty, however, does not arise so much from a determination of a proper definition of the clause under consideration, as it does from an application of the same to a given state of facts. In this connection it has been frequently said that each case must be determined from a consideration of its own facts and circumstances. *Inland Steel Co. v. Lambert* (1917), 66 Ind. App. 246, 118 N. E. 162.

Directing our attention to the facts disclosed by the finding in the instant case, it is obvious that, if the decedent had received his injuries while pre-

5. paring to obtain dirty gasoline for use in cleaning the floors, in accordance with the custom in that regard, they would have been received by accident arising out of and in the course of his employment. The question now arises whether it must be held otherwise, because the finding shows that he was preparing to obtain clean gasoline for such purpose, and also shows that there was no evidence as to whether he, and the janitors working under him, had ever used clean gasoline on previous occasions. The Industrial Board has held in effect that this question must be answered in the negative, and in our opinion it reached the right conclusion. It is apparent that the decedent was preparing to procure clean gasoline for the purpose of performing work in the scope of his employment. True, it ap-

pears that he was deviating from the usual custom in that regard, by arranging to use clean instead of dirty gasoline, but that is not sufficient to force a conclusion that the accident resulting in his death did not arise out of and in the course of his employment, as it will be presumed, in the absence of a finding to the contrary, that a servant may use some discretion in the performance of the work assigned him. Indeed, the services of an employe, who must be directed as to the details of his work under all the varying circumstances that may arise, as a rule, would be undesirable, and in many instances of little value. Under the facts found in the instant case it should not be assumed that the decedent, in attempting to procure clean gasoline to carry on his work, did a wrongful act, or turned aside from his employment so as to place himself and his dependents outside of the protection of the law, but rather that he was exercising a reasonable discretion in the discharge of his duties under the existing circumstances. *Elk Grove Dist. v. Industrial Acc. Comm.* (1917), 34 Cal. App. 589, 168 Pac. 392. In this connection it should be

observed that the Workmen's Compensation

6. Act of this state, *supra*, does not limit compensation to cases where an injury is received by an employe while he is performing his work in the usual and customary manner or in the way directed. It is a fair inference that, if the legislature had intended to so limit the right to compensation, appropriate language would have been used to indicate such fact. We are therefore justified in refusing to give it such a narrow construction, and in holding that an employe, who in an honest attempt to discharge a duty assigned him, does an act incidental

thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself, or his dependents, of a right to compensation, if injured while so engaged. *State, ex rel. v. District Court, etc.* (1915), 129 Minn. 176, 151 N. W. 912.

An employe may be said to receive an injury by accident arising in the course of his employment within the meaning of the Workmen's Compensation

7. tion Act of this state, *supra*, when it occurs within the period of employment, at a place where the employe may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment. *In re Ayers* (1918), 66 Ind. App. 458, 118 N. E. 386; *Granite Sand, etc., Co. v. Willoughby* (1919), 70 Ind. App. 112, 123 N. E. 194; *Fairbank Co. v. Industrial Comm.* (1918), 285 Ill. 11, 120 N. E. 457. It will be observed that under this rule it is not necessary that an

8. employe, in order to receive compensation if injured, shall be performing his duties in obedience to some direction, or in accordance with some general rule or custom. It suffices if he be doing something reasonably connected therewith. Under this rule and the facts found, the procurement of clean gasoline with which to clean the floors, even if it had never been used for that purpose before, was clearly the performance of an act reasonably connected with such work. This would be true even if the facts disclosed, as appellants contend the evidence shows, that the decedent, in attempting to procure clean gasoline for such purpose, was disobeying an order theretofore given him in that regard, as the fact of such disobedience would bear on the question

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of wilful misconduct rather than on the question under consideration. *Nat. Car Coupler Co. v. Marr* (1919), 69 Ind. App. 206, 121 N. E. 545.

Under the facts found, there are no sufficient grounds on which to base a conclusion that the decedent's injury and death were due to wilful misconduct. For the reasons stated, we conclude that the finding of facts is sufficient to sustain the award.

Finding no error in the record, the award is affirmed, and, by virtue of the statute, the amount thereof is increased five per cent.

LAKE COUNTY AGRICULTURAL SOCIETY v. VERPLANK
ET AL.

[No. 9,953. Filed October 16, 1919.]

1. **APPEAL.—Questions Presented.—Ruling on Motion for New Trial.—Failure to File Bill of Exceptions in Time Allowed.**—Where defendant's motion for a new trial was overruled and it failed to file its bill of exceptions in the time fixed by the court, no available error is presented by the motion for new trial. p. 188.
2. **APPEAL.—Review.—Ruling on Motion to Make Complaint More Specific.—Discretion of Trial Court.**—The granting or refusing of a motion to make the complaint more specific is not wholly within the discretion of the trial court, but, unless it clearly appears that the complaining party has suffered by the court's refusal to sustain such a motion, the cause will not be reversed. p. 188.
3. **APPEAL.—Review.—Ruling on Motion to Make Complaint More Specific.**—In an action to recover for automobile hire, which was shown by bill of particulars filed with the complaint to have consisted of twenty separate items, the date of each being given, the denial of defendant's motion to make the complaint more specific held not seriously prejudicial to defendant, so as to justify a reversal. p. 188.
4. **AGRICULTURE.—Incorporated Agricultural Societies.—Powers.—Contracting for Automobile Hire.—Statutes.**—An agricultural so-

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ciety organized under §3195 *et seq.* Burns 1914, §2629 R. S. 1881, has implied power to contract for anything, such as the hiring of automobiles, that will further the purposes of the organization. p. 189.

5. AGRICULTURE.—*County Agricultural Societies.—Actions Against.—Defenses.—Ultra Vires Acts.—When Estopped to Plead.—An incorporated county agricultural society which has received the benefit of automobile hire for which it has contracted, cannot be permitted to set up the defense, in an action for such services, that it had no power to make the contract.* p. 189.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by George Verplank and others against the Lake County Agricultural Society. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Newton A. Hembroff, for appellant.

Harris & Ressler, for appellees.

NICHOLS, P. J.—This action was commenced by the appellees, against appellant, in the Lake Superior Court at Hammond, and afterwards transferred to the Lake Superior Court at Crown Point. The complaint is in one paragraph, and avers in substance that the appellant is indebted to the appellees in the sum of \$380.50, for automobile hire, or livery, furnished at the special instance and request of the appellant, a bill of particulars of which is filed and made a part of the complaint, and consists of twenty items of charges for auto hire, or livery, extending from August 15, 1915, to September 6, 1915, inclusive, the separate items of daily charges totaling \$380.50. It contains the usual allegations of past due, unpaid, demand for payment, and refusal and failure to pay.

A motion was filed to require appellees to make the complaint more specific, which was overruled. Appellant then filed its demurrer to the complaint, for want of facts to constitute a cause of action, with

memoranda to the effect that: The complaint shows on its face that the appellant is an agricultural society, with only such powers as are given it by §§3195, 3196 Burns 1914, §§2629, 2630 R. S. 1881; that the appellant had no power to enter into any contract, or to accept or request any services, such as are sued upon; and the suit is brought for services rendered to a corporation, which said corporation is deprived by law of the right to contract for, solicit, accept, or receive.

The demurrer was overruled, after which the appellant answered in general denial; the case was tried by the court, without a jury, and a judgment

1. was rendered in favor of appellees. There was a motion for a new trial, which was overruled, but, as the appellant failed to file his bill of exceptions in the time fixed by the court, no available error is presented by the motion for a new trial.

The only alleged errors properly assigned are the ruling of the court on the appellant's motion to make the complaint more specific, and the ruling of

2. the court on the appellant's demurrer to the complaint. The granting or refusing of a motion to make the pleading more specific is not wholly within the discretion of the trial court, but, unless it clearly appears that the complaining party has suffered by the court's refusal to sustain such a motion, the cause will not be reversed because of the court's ruling. *Cincinnati, etc., Railroad v. Miller* (1905), 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; *Leimgruber v. Leimgruber* (1909), 172 Ind. 370, 86 N. E. 73, 88 N. E. 593. In the bill of particulars there are twenty items of charges, each for automobile livery, daily rendered from August 15, 1915, to September 6, 1915. The nature of these
- 3.

services, if performed, and the time occupied in such performance, must have been peculiarly within the knowledge of the appellant, as well as the appellees, and, while the court might, without error, have sustained the motion to make the items more definite as to the nature of the traffic and time occupied in its performance, we do not see how the appellant could have been seriously injured by the court's ruling, so as to justify a reversal by reason thereof. *Huntington Fuel Co. v. McIlvaine* (1908), 41 Ind. App. 328, 82 N. E. 1001; *Kelsay v. Chicago, etc., Railroad* (1908), 41 Ind. App. 128, 81 N. E. 522.

We see nothing in the complaint that shows that the appellant was incorporated under §§3195, 3196, *supra*, and §3211 Burns 1914, Acts 1889 p. 273;

4. but, if it was, there is no reason why it could not have contracted for such services as are the basis of this action. A corporation has
5. implied power to contract for anything that will further the purpose of its organization.

Barnett, Admr., v. Franklin College (1893), 10 Ind. App. 103, 37 N. E. 427; *Wright v. Hughes* (1889), 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412. Further, if the contract for the services rendered was in excess of appellant's granted power, it appears on the face of the complaint that the appellants received the benefits of the services contracted for, and it must not now be permitted to set up and maintain a defense that it had no power to make the contract. 10 Cyc 1156.

The demurrer was properly overruled. The judgment is affirmed.

McCool v. Mickler—71 Ind. App. 190.

MCCOOL ET AL. v. MICKLER ET AL.

[No. 9,963. Filed October 16, 1910.]

APPEAL.—Conflicting Evidence.—The court on appeal will not weigh conflicting evidence.

From Orange Circuit Court; *William H. Paynter*, Judge.

Action between William E. McCool and others and Sylvester Mickler and another. From the judgment rendered, McCool and others appeal. *Affirmed.*

Albert W. Funkhouser, Arthur F. Funkhouser, Robert D. Markel, Albert C. Funkhouser and Samuel R. Lambdin, for appellants.

Bayless Harvey, Arthur E. McCart and Harry A. Carnes, for appellees.

NICHOLS, P. J.—The only error assigned in this court is that the trial court erred in overruling appellants' motion for a new trial, in which motion it is specified that each of the special findings of fact, numbered from 1 to 21 inclusive, is not sustained by sufficient evidence.

Notwithstanding the rule, so well established that we do not need to cite authorities, that the Appellate Court will not weigh the evidence, when a substantial conflict exists, we have in this case carefully examined the evidence contained in the briefs of the parties, and we find it ample to sustain the finding of the court. Nothing can be gained by making further statement of the case. The judgment is affirmed.

STURGEON v. LOPSHIRE.

[No. 9,960. Filed October 16, 1919.]

APPEAL.—Briefs.—Questions Presented.—Where the overruling of the motion for a new trial was the only error assigned that appellant undertakes to present, discussing thereunder alleged errors in admitting certain evidence, but neither the motion nor the substance thereof is set out in his brief, and it does not appear from the brief that any bill of exceptions containing the evidence was ever filed and made part of this record, no question is presented for review on appeal.

From Allen Circuit Court; *J. W. Eggeman*, Judge.

Action by Lucretia Lopshire against James R. Sturgeon. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

S. M. Hench and *E. V. Harris*, for appellant.

John H. Aiken, for appellee.

NICHOLS, P. J.—This action was in the Allen Circuit Court for damages suffered by the appellee, resulting from the alleged negligence of the appellant in permitting a blind horse of vicious disposition to stand unattended and unhitched upon the public streets of Ft. Wayne, Indiana. The horse became frightened and ran away, and, on account of being blind, ran into appellee's place of business, demolishing the front of her store and a large amount of personal property therein. The cause was put at issue by a general denial, and submitted to a jury for trial, which returned a verdict for appellee in the sum of \$250.

Appellant filed a motion for a new trial, which was overruled, and this ruling of the court is the only error assigned that appellant undertakes to present, discussing errors in admitting certain evidence.

Stiefel v. Witherspoon—71 Ind. App. 192.

The motion for a new trial, or the substance thereof, is not set out in appellant's brief. It does not appear by appellant's brief that any bill of exceptions containing the evidence was ever filed and made a part of the record. In such condition of the record, as shown by the brief, no question is presented for our consideration. *Burck v. Davis* (1905), 35 Ind. App. 648, 73 N. E. 192; *Talbott v. Town of Newcastle* (1907), 169 Ind. 172, 81 N. E. 724; *Külmer v. Money-weight Scale Co.* (1905), 36 Ind. App. 568, 76 N. E. 271; *Meharry v. Simmons* (1857), 9 Ind. 177.

The judgment is affirmed.

STIEFEL ET AL. v. WITHERSPOON.

[No. 10,058. Filed October 6, 1919.]

1. **SALES.—Sale of Cattle.—Breach of Warranty.—Measure of Damages.**—Where a seller of cattle warranted them to be sound and free from disease and the animals developed illness after the buyer had placed them with his own herd, the measure of damages in a suit for a breach of warranty, where the seller had reason to know that the purchaser intended to mingle them with other cattle owned by him, is the difference between the value of the diseased cattle and what the value would have been at the time of sale had they been as warranted, together with the loss suffered by the purchaser from the infection of other cattle, and other reasonable expenses incurred in caring for and doctoring such cattle. p. 197.
2. **SALES.—Sale of Cattle.—Breach of Warranty.—Action.—Necessity of Alleging Special Damages.**—Where a seller warranted cattle to be free from disease, and after sale they developed an infection which was communicated to the buyer's herd with which they were mingled, the complaint in an action by the buyer for breach of the warranty need not particularly aver general damages, but special damages, such as those occasioned by communication of the disease to the buyer's herd, must be specially pleaded. p. 198.

From Knox Circuit Court; *Sherman G. Davenport*, Special Judge.

Action by James P. Witherspoon against Willis G. Stiefel and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Thomas M. McDonald, Morton C. Embree and Lucius C. Embree, for appellants.

LeRoy M. Wade, Arnold J. Padgett and Sanford Trippet, for appellee.

McMAHAN, J.—This is an action instituted by the appellee against appellants to recover damages alleged to have been suffered by reason of a breach of warranty in the sale of certain cattle alleged to have been diseased. The cause was tried by the court. There was a special finding of facts and conclusions of law.

The facts as found are in substance that on and prior to October 14, 1915, appellants were partners engaged in buying and selling stock; that on said date they sold seven head of yearling steers to appellee, and warranted them to be sound and free from all diseases except slight colds due to shipment. Appellee relied on said warranty and paid appellants \$266.47 for the steers, which were of equal size and value, and, if they had been sound as warranted, would have been worth said sum.

On October 21, 1915, the appellants sold appellee nine yearling heifers, and warranted them to be sound and free from disease except a slight cold due to shipping; that appellee relied upon said warranty and purchased said heifers, paying therefor \$272.22, the heifers being of equal size and value, and, if they had been sound and free from disease as warranted, would have been worth \$272.22. At the time appellee

purchased said steers and heifers, he owned a farm and herd of twenty head of good marketable cattle, which were all healthy and free from disease, and then worth \$650; that the appellee, believing said steers and heifers were free from contagious and infectious disease, turned said steers and heifers into the pasture with his twenty head of healthy cattle, where the same intermingled and were fed together. At the time when appellants sold said cattle to appellee, some of the steers and some of the heifers were affected with a contagious disease known as "hemorrhagic septicemia." On October 25, 1915, one of the heifers died, on appellee's farm, of said disease. Appellants paid appellee \$30.20 on account of the loss of said heifer. On October 28 another one of the heifers died of said disease; that if said heifer had been sound and healthy as warranted, it would have been worth \$30.24. One of the steers died of said disease October 20. If it had been sound and healthy as warranted, it would have been worth \$38.07. One of the heifers died July 9, 1916, the cause of her death not being shown by the evidence; that each of said cattle so purchased from appellants by appellee either had said disease at the time of the purchase, or contracted said disease from contact with the other cattle so purchased; that the said steers which did not die, having become infected with said disease, were at the time of said purchase worth only \$114.21; that appellee paid appellants \$228.42 for said steers which did not die; that said heifers so purchased from appellants, and which did not die of said disease, were at the time of the purchase, on

account of being affected with said disease, worth only \$105.84; that appellee paid appellants \$211.68 for said heifers which did not die; that, because of the mingling of said purchased cattle so affected with said contagious disease with appellee's herd then on his farm, the entire herd became infected with said disease; that appellee, in an effort to cure said disease, employed a veterinary surgeon to treat said cattle, and spent extra time and labor both by himself and hired help in looking after and caring for said cattle; that, by reason of plaintiff's herd of twenty cattle having contracted said disease, they depreciated in value from the sum of \$650 to \$325, said sum being their respective values before and after being infected with said disease.

By the sixth conclusion of law the court stated that the appellee was entitled to recover from appellants \$613.36 as damages arising from and growing out of said breaches of warranty. The seventh conclusion is to the same effect. The other conclusions of law are nothing more than conclusions of fact, and were fully stated and covered by the special finding of facts, and require no further consideration.

The errors assigned are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in each of its conclusions of law; and (3) that the court erred in overruling the motion for a new trial. The only errors assigned that require any consideration are those challenging the correctness of the conclusions of law, and the action of the court in overruling the motion for a new trial. The gist of appellant's contentions is that the damages assessed and fixed by the court are not such as the law authorizes in cases of this

kind. Appellants claim that the measure of damages in cases of this kind is the difference between the value of the cattle in their diseased condition and their value if they had been as warranted; that the complaint does not allege facts, and that no facts are found authorizing the conclusion that damages should be allowed on account of the steers and heifers that were not sick at the time of the purchase, or for damages to appellee's herd of twenty cattle.

Appellants argue that the probability of the herd of twenty cattle being infected was not referred to in the sale of the steers and heifers, that the damage to the herd was not such as naturally arises in the usual course of things, and that the possibility of infecting the herd was not referred to in connection with the sale and warranty.

The gist of the first paragraph of the complaint is that the appellant sold appellee the seven steers, and warranted them to be sound and free from disease; that appellee, relying upon said warranty, purchased them; that said steers, when purchased by appellee, were not sound and free from disease, but were unsound and sick with a contagious disease from which one of them died two weeks later; that the remainder were, by reason of the diseased condition, worthless; that appellee at the time of said purchase was the owner of a herd of cattle which were sound in health and free from disease, and which he was pasturing on his farm, which appellants then knew; that appellee informed appellants at the time of said purchase that he expected and intended to turn said steers in with said other cattle, and that he had no other suitable place for them, all of which was known to appellants when they sold the steers to appellee;

that appellee, not knowing that the steers were infected with a contagious disease, and relying upon the representations and warranty of appellants, intermingled the steers with his herd of well cattle, and that the said herd contracted said disease from contact and association with said sick steers, and by reason thereof became seriously sick, diseased and valueless. The second paragraph is the same as the first, except that it alleges a sale by appellants to appellee a few days later of seven head of yearling heifers. A supplemental complaint was afterwards filed alleging that, by reason of the sick and diseased condition of said steers and heifers, two of said heifers bought of appellants sickened and died; that another one had aborted and lost her calf; that several of the cows in his original herd lost their calves; and that said remaining steers and heifers and his original herd of said cattle were and still remained sick with said disease and valueless.

Appellants' contentions are mainly based upon the idea that the measure of damages in a case of this kind is the difference between the amount paid

1. for the cattle, and what their value would have been, if they had been in the condition as warranted. We cannot agree with appellant in this contention. The measure of damages in a suit for a breach of warranty in the sale of cattle infected with a contagious disease, where the seller has reason to know the purchaser intends to mingle them with other cattle owned by him, is the difference between the value of the diseased cattle, and what the value would have been at the time of sale, had they been as warranted, together with the loss suffered by the purchaser from the infection of other cattle, and

reasonable expenses incurred in caring for and doctoring such cattle. *Rose v. Wallace* (1858), 11 Ind. 112; *Mitchell v. Pinckney* (1905), 127 Iowa 696, 104 N. W. 286; *Joy v. Bitzer* (1889), 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184; *Snowden v. Waterman & Co.* (1898), 105 Ga. 384, 31 S. E. 110; *Cummins v. Ennis* (1903), 4 Pennewill (Del.) 424, 56 Atl. 377; *Bradley v. Rea* (1867), 14 Allen (Mass.) 20; *Marsh v. Webber* (1871), 16 Minn. 418 (Gil. 375).

In actions of this character, general damages need not be particularly alleged in the complaint, except as they arise from the statement of the defect

2. or disease which must necessarily be stated in order to allege breach of warranty. Damages occasioned by the communication of the disease to other cattle of appellee are of the character known as special damages, and cannot be recovered unless specially pleaded. The Supreme Court of Vermont in *Packard v. Slack* (1859), 32 Vt. 9, in speaking of a breach of warranty in the sale of sheep, said: "It was not necessary for the plaintiff to allege or to prove that the defendant knew he intended to mingle the sheep purchased with others who might thereby contract the contagious disease with which these were affected. The rule as to what damages can be recovered is laid down to be the *natural and proximate consequence* of the act complained of. * * * The placing of these sheep with others was one of those natural and ordinary acts and modes of using such animals, that the defendant might reasonably expect it would or might be done, and that as he knew they had a contagious disease, they would thereby communicate it. He was therefore liable for such con-

sequence or damage, though not expressly informed that such use was intended by the plaintiff.”

In *Joy v. Bitzer*, *supra*, it was said: “ ‘If animals sold are warranted sound, and are not so, but have an infectious or contagious disease, which they communicate to others, where the parties contemplate their being placed with other stock, the loss, not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of, and doctoring them.’ ”

We have examined all of the evidence introduced, and are satisfied that the decision of the court is amply sustained by the evidence. We find no reversible error in the record. Judgment affirmed.

MEEKER HOTEL COMPANY v. FORGAN ET AL.

[No. 9,967. Filed October 16, 1919.]

1. **APPEAL.—Review.—Harmless Error.—Replevin.—Failure to Find Value of Property.**—In an action in replevin, where the jury found that defendant was not entitled to the property in controversy, the jury's failure to find the value of the property was harmless to defendant, and it cannot complain. p. 201.
2. **EVIDENCE.—Expert Testimony.—Removing Wiring from Building Without Injury.**—In an action in replevin to recover certain telephone wires, cable terminals, etc., installed in a hotel building, testimony of an expert that such equipment could be removed without great injury to the building, was proper. p. 201.
3. **REPLEVIN.—Jury Questions.—Sufficiency of Demand.**—In an action in replevin to recover wiring, cable terminals, and other telephone equipment installed in a hotel building, question whether plaintiffs made sufficient demand for equipment in controversy held for the jury. p. 202.

Meeker Hotel Co. v. Forgan—71 Ind. App. 199.

From Marion Superior Court (103,249); *W. W. Thornton*, Judge.

Action by David R. Forgan and others against the Meeker Hotel Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed*.

Thomas D. McGee, for appellant.

Samuel O. Pickens, Charles W. Moores, R. F. Davidson, Owen Pickens, Horace H. Martin and M. P. Turner, for appellees.

NICHOLS, P. J.—This was a suit brought in replevin by appellees against appellant to recover certain telephone wires, cables, equipment, etc., which articles and equipment are located in the Oneida Hotel Building, in the city of Indianapolis, Indiana, said hotel being at the time operated by appellant under a lease. The complaint, in one paragraph, was in the usual form, alleging ownership and the right of immediate possession in the appellees and wrongful detention by appellant. To this complaint there was an answer in general denial, and a second paragraph averring that the articles in question were and had become fixtures by being attached to the realty. To this paragraph there was reply in denial. The case was submitted to a jury for trial, which returned a verdict for appellees as follows: "We the jury find for the plaintiffs and that they are entitled to possession of the personal property in controversy; that the same is unlawfully detained by the defendant; that the same is of the value of \$—— and we assess the plaintiffs' damages for the detention of said property at the sum of \$5.00."

Appellant filed a motion for a *venire de novo*, which was overruled, after which it filed a motion for a

new trial, which was overruled. These rulings of the court are assigned as errors.

Appellant contends that it was reversible error for the court to overrule appellant's motion for a *venire de novo*, for the reason that the jury

1. failed to assess the value of the property. But, by the terms of the verdict, the appellant was not entitled to the property in controversy, nor to the value thereof, and therefore it is not harmed by the jury's failure to find the value thereof, and cannot be heard to complain. *Chissom v. Lamcool* (1857), 9 Ind. 530.

It appears by the evidence that in the year 1910 the two buildings now being operated by appellant for hotel purposes were so used by a tenant

2. named Johnson. When said Johnson took possession, the Central Union Telephone Company wired and equipped said building with the equipment now in controversy. Later the hotel business passed by successive transfers to appellant, the equipment aforesaid remaining in the building, and being used by said telephone company in supplying telephone service to the successive transferees, including the appellant, until appellant discontinued service with said telephone company. The next day thereafter, appellees sent their servants in charge of one Harry F. Bacon, who was at the time superintendent of equipment, for the purpose of removing said equipment, and Bacon informed one Thomas Meeker, who was at the time manager of appellant's business and as such authorized to operate and maintain the same, that appellees wanted to take equipment out, and said manager then told Bacon that he could not, stating that he had no right to do so. Said manager

then knew that said employes of the telephone company had authority to remove said equipment. Said Bacon reported the refusal to appellees, and the next day thereafter this suit was begun. There is no controversy as to part of the equipment, it being conceded that appellees have a right thereto, but there is controversy as to certain lead-covered telephone cable, cable terminals, one house cable box, and twenty-two terminal strips. Appellant contended that these articles were so attached to the building, running through the floors, walls, ceilings and other parts of the building that they could not be removed without great injury, but witness Bacon, testifying as an expert, stated that the said equipment could be removed without injury to the building. Appellant objected to this testimony, but it was proper evidence. 17 Cyc 216.

Appellant contends that there was no sufficient demand, but the foregoing statement of facts contains enough to justify submitting this question to the jury, and the jury has found by its verdict that the demand was sufficient.

Appellant complains of certain instructions given by the court, and of the refusal of the court to give certain instructions by it tendered. We have carefully examined all the instructions given, as well as all that were tendered, and conclude that the instructions given fairly and fully inform the jury as to the law of the case, and that there was no reversible error in refusing to give the instructions tendered by appellant. The evidence sustains the verdict. The judgment is affirmed.

F. & B. Livery Co. v. Indianapolis Traction, etc., Co.—71 Ind. App. 203.

F. AND B. LIVERY COMPANY v. INDIANAPOLIS TRACTION
AND TERMINAL COMPANY.

[No. 10,004. Filed October 16, 1919.]

TRIAL. — Verdict. — Setting Aside. — Nominal Damages. — Improper Compromise. — Reversal.—In an action to recover damages to an automobile hearse resulting from a collision with a street car, where the undisputed evidence showed that the cost of repairs was \$146.11, and that plaintiff paid \$35 for a new tire to replace one destroyed in the accident, and that the value of the hearse, after being repaired, was worth less than before the collision, a verdict in the sum of one dollar, *held*, excluding every other possible influence, to be in itself conclusive proof that it was agreed upon as a result of an improper compromise, and the judgment will be reversed.

From Marion Superior Court (104,686); *John J. Rochford*, Judge.

Action by the F. and B. Livery Company against the Indianapolis Traction and Terminal Company. From the judgment rendered, plaintiff appeals. *Reversed*.

A. M. Bristor and *A. F. Buchanan*, for appellant.
D. E. Watson, for appellee.

The appellant instituted this action against the appellee to recover damages. Appellant's agent was driving its hearse westward in Jackson street in the city of Indianapolis, and while crossing the street car tracks in Illinois street one of appellee's cars ran against the hearse. As a result of the collision, the hearse was injured in the following particulars: One tire was ruined, the right front wheel was broken off, the front axle was bent, some spokes of a front wheel were broken, the fenders and a running board

were "smashed," the steering arms were broken or bent, both front lamps were broken, the radiator was damaged, the enamel and paint on the body was cracked and scratched, and the steel beams of the body were bent. There were other items of injury which we need not enumerate.

As to the measure of damages the jurors were instructed: "If you find for the plaintiff, in computing its damages, if any, you will take into consideration the difference in the value of the property before and after the accident. * * * If you find that the property was injured as alleged and that it was subsequently repaired, and if you further find that the making of the repairs substantially restored the property to its former condition, then the cost of the repairs is a proper item for you to consider in estimating the damages. If you find that the repairs were made but did not substantially restore the property to its former condition, then the measure of damages is the cost of the repairs plus such diminution in value of the injured property as was occasioned by the accident. * * *"

The undisputed evidence is that the hearse was repaired by a reputable concern at the reasonable cost of \$146.11; that in addition thereto appellant paid \$35 for a new tire to replace the one destroyed; and that the value of the hearse, after being repaired, is less than before the accident.

Verdict and judgment for appellant in the sum of one dollar.

DAUSMAN, J. (After making the foregoing statement).—

Appellant's motion for a new trial should have

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been sustained for the reasons stated in *Paxson v. Dean* (1903), 31 Ind. App. 46, 67 N. E. 112.

Counsel for appellee say: "The mere fact that the jury found for the plaintiff and assessed his damages at one dollar is conclusive that the majority of the jury were in favor of finding for the defendant, and simply found a nominal sum to satisfy some member of the jury who seemed to desire that a verdict should in all events be given against the appellee for some amount."

That the verdict is the result of a compromise of some sort is a legitimate inference. But that serves only to aggravate the wrong. Jurors are sworn to render a true verdict according to the law and the evidence. They should consecrate themselves to the fulfilment of that oath. They must not be permitted to trifle with the rights of citizens whose controversies are submitted to them for decision. When a juror deliberately sacrifices his convictions, he violates his oath and inflicts a serious wrong, not only upon the litigants, but also upon the state.

In *Goodsell v. Seeley* (1881), 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183, Judge Cooley said: "It is no doubt true that juries often compromise * * * and that by 'splitting differences,' they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, * * * and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties that the

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jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise.”

In *Simmons v. Fish* (1912), 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D 588, the court said: “But a verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue and the result is one which does not command the approval of the whole panel, is a compromise verdict founded upon conduct subversive of the soundness of trial by jury.”

If we exclude every other possible influence, then the verdict itself is conclusive proof of an improper compromise of the vital principles which should have controlled the decision. The result is injustice.

The judgment is reversed, and the trial court is directed to sustain appellant’s motion for a new trial.

CITY OF JEFFERSONVILLE v. SCHEER.

[No. 10,034. Filed October 16, 1919.]

MUNICIPAL CORPORATIONS.—City Treasurer.—Collection of Delinquent Assessments.—Fees.—Under §1 of the act of March 9, 1909 (Acts 1909 p. 454), providing that in cities of the fifth class, where the county treasurer acts as city treasurer he shall receive, in addition to his salary, five per cent. of the amount of all delinquent city taxes collected by him for the city, and §2 of the act of March 12, 1907 (Acts 1907 p. 550, §8720 Burns 1914), providing that all other provisions of the law relating to the collecting and accounting for state, county, township, road,

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city school, and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments in cities of the class referred to in the act, which embraces cities of the fifth class, a county treasurer who was acting treasurer of a city of the fifth class was entitled to receive, for services rendered by him in collecting delinquent assessments for public improvements, a sum equal to five per cent. of the amount so collected.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by George A. Scheer against the City of Jeffersonville. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Jonas G. Howard and *Wilmer T. Fox*, for appellant.

Henry A. Burt and *James E. Taggart*, for appellee.

REMY, J.—Appellee was treasurer of Clark county, Indiana, from January 1, 1909, to December 31, 1912. By virtue of §1 of the act of March 9, 1909 (Acts 1909 p. 454), appellee was also, during said period, the acting treasurer of appellant city, a city of the fifth class. Prior to and during the time appellee was such treasurer, appellant city caused certain of its streets to be improved, and certain sewers to be constructed. Certified copies of all the assessment rolls of all of said improvements and constructions were placed in the hands of appellee as such acting city treasurer for collection. Some of said assessments became delinquent, and appellee as such acting city treasurer collected the same with a penalty of ten per cent., and paid the amount collected to the city, all as required by law. For his services in collecting said delinquent assessments, appellee presented to the city council

of said city his claim for five per cent. of the amount so collected. The claim was disallowed, and this action was commenced by appellee to recover from appellant city the amount of his claim. A trial by the court resulted in a finding and judgment for appellee.

The one question presented for our consideration is whether or not under the above facts, and under the statutes in force at the time, appellee was entitled, as a part of his remuneration for services rendered appellant city in collecting the delinquent assessments, to five per cent. thereof.

Section 1 of the act of March 9, 1909 (Acts 1909 p. 454), which is an amendment of §43 of "an act concerning municipal corporations" approved March 6, 1905 (Acts 1905 p. 239), provides:

"In cities of the fifth class where the county treasurer acts as city treasurer, his salary as such shall be three hundred dollars per year, which may be increased by ordinance to any sum not exceeding eight hundred dollars per year. In addition to such salary the county treasurer shall receive five per cent. of the amount of all delinquent city taxes collected by him for such city."

Section 2 of the act of March 12, 1907 (Acts 1907 p. 550, §8720 Burns 1914), which is an amendment of §115 of the "act concerning municipal corporations" approved March 6, 1905 (Acts 1905 p. 296), provides as follows:

"All other provisions of the law relating to the collecting and accounting for state, county, township, road, city, school, and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments, in cities of the class referred to in this act."

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These provisions of the law governing cities of this state, including cities of the fifth class, were in full force and effect during all of the time appellee was the acting treasurer of appellant city. If we construe them together, as we must, it is clear that appellee was entitled to receive for services rendered by him in collecting the delinquent assessments, a sum equal to five per cent. of the amount so collected. See *Bartholomew v. City of Tipton* (1918), 66 Ind. App. 657, 118 N. E. 700.

Judgment affirmed.

NICHOLAS v. BALDWIN PIANO COMPANY.

[No. 9,834. Filed May 15, 1919. Rehearing denied October 16, 1919]

1. **INNKEEPERS.—Common-Law Lien.—Goods in Possession of Guests.**—By the adoption of the common law as part of the law of Indiana, innkeepers acquired the right to assert the common-law lien upon goods brought into the inn by a guest for board and lodging furnished the latter at his request, even though the goods were not the property of the guest, provided the innkeeper is not aware of such fact, the proviso, however, not being applicable under all circumstances where the guest was the agent or servant of the owner of the goods. p. 211.
2. **STATUTES.—Change in Common Law.—Presumption.**—It will be presumed that the legislature does not intend by the enactment of a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication. p. 211.
3. **STATUTES.—Abrogation of Common Law.—Substitution or Repugnancy.**—An abrogation of the common law will be implied where a statute is enacted which undertakes to cover the entire subject treated and is clearly designed as a substitute for the common law, or where two laws are so repugnant that both in reason may not stand. p. 211.

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4. **INNKEEPERS.—Right to Lien on Baggage of Guest.—Abrogation of Common Law.**—The enactment of §§7848-7850 Burns 1914, Acts 1897 p. 123, as amended, Acts 1911 p. 187, for the protection of innkeepers, abrogated the common-law lien in their favor, and restricts the property to which an innkeeper's lien may attach to that owned by the person creating the debt. p. 213.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by the Baldwin Piano Company against Samuel W. Nicholas. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Samuel L. Trabue and *William W. Lowry*, for appellant.

John H. Kiplinger and *Donald L. Smith*, for appellee.

BATMAN, P. J.—This is an action in replevin commenced by appellee against appellant to recover the possession of a piano and stool. The complaint is in the usual form for such an action, and was answered by a general denial. On the trial the court made a special finding of facts, and stated its conclusion of law thereon in favor of appellee. From a judgment rendered in accordance therewith, appellant has appealed, claiming that the court erred in its conclusion of law on the facts found. Appellant contends that the finding of facts shows that he had a common-law lien as an innkeeper on the property in question, which gave him a right to the possession thereof, and that the court erred in its conclusion of law to the contrary. Appellee, on the other hand, asserts that there is no common-law lien in Indiana in favor of innkeepers, and that the conclusion of law was properly stated.

The common law gives an innkeeper a lien upon the

goods brought into his inn by his guest, for board and lodging furnished the latter at his request,

1. although the goods may not be the property of said guest, provided the innkeeper is not aware of such fact. This proviso, however, is not applicable under all circumstances where the guest is the agent or servant of the owner of the goods. 22 Cyc 1090. By the adoption of the common law as a part of the law of this state, innkeepers doing business therein acquired the right to assert such a lien in all proper cases, and such right still exists unless they have been deprived thereof by legislative enactment.

It is well settled in this state that it will be presumed that the legislature does not intend by the enactment of a statute to make any change in

2. the common law beyond what it declares, either in express terms or by unmistakable implication. *Chicago, etc., R. Co. v. Luddington* (1910), 175 Ind. 35, 91 N. E. 939, 93 N. E. 273. An abrogation of the common law will be implied where a

3. statute is enacted which undertakes to cover the entire subject treated, and was clearly designed as a substitute for the common law in that regard, or where the two laws are so repugnant that both in reason may not stand. 8 Cyc 376; 26 Am. and Eng. Ency. Law 665; 1 C. J. 991; 5 R. C. L. 815; *Boston Ice Co. v. Boston, etc., Railroad* (1913), 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A 1090; *Drady v. District Court, etc.* (1905), 126 Iowa 345, 102 N. W. 115; *Graves v. Railroad* (1912), 126 Tenn. 148, 148 S. W. 239; *Raleigh Co. Bank v. Poteet* (1914), 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915B 928, Ann. Cas. 1917D 359; *Young v. Kansas*

City, etc., R. Co. (1889), 33 Mo. App. 509. In 1897 the legislature of this state enacted a statute for the protection of owners and keepers of hotels, inns, restaurants, boarding and eating houses, which is still in force. It contains three sections, the first of which provides a penalty for obtaining food, lodging, entertainment or other accommodations, at any of the places named above, with intent to defraud the owner or keeper thereof. The second prohibits any person boarding or lodging, or who has boarded or lodged at any of the places named above, from removing any trunk, valise or other baggage therefrom, which he may have therein, "until all claims for bills, lodging, entertainment or accommodations have been fully paid and satisfied in accordance with the regular advertised or special contract rates" thereof, and provides a penalty for its violation.

The third section provides in part as follows: "The owner or keeper of any hotel, inn, restaurant, boarding or eating house, as provided in this act, shall, after demand for payment be made of the person or persons owing any such claims or bills, as set out in the preceding section of this act, have a lien against the personal property and wages due of any person or persons who may owe said owner or keeper for food, lodging, entertainment or other accommodation, to the extent only of his said claim, and the property may be sold to satisfy such claim, by said owner or keeper after obtaining judgment for the same in any court of competent jurisdiction and posting a written notice on the outer door of his hotel, inn, restaurant, boarding or eating house, at least ten days before the day of sale at public outcry to the highest

bidder," etc. §§7848-7850 Burns 1914, Acts 1897 p. 123, as amended, Acts 1911 p. 187.

We will now consider whether, under the foregoing facts, a common-law lien has existed in this state in favor of innkeepers since the enactment of the

4. statute cited. It will be observed that this statute not only designates who shall be entitled to such a lien, but also specifies the services for which such lien may be had, the property to which and the condition on which it may attach, and the manner of its enforcement; that it goes beyond the scope of the common law, by including persons not entitled to a lien thereunder, and by designating services for which a lien may be had, and property to which it may attach, not specified therein. It thus appears that the entire subject to which the statute relates is fully covered thereby. It will also be observed that, unlike the common law, it does not give the innkeeper a lien on all property brought into his inn by a guest, unless he is aware that the guest is not the owner thereof, but restricts the property to which the lien may attach, by limiting it to the property of the person indebted for the services specified. This may be taken as indicative of a legislative intent to repeal or abrogate the common law respecting innkeeper's liens. *Boston Ice Co. v. Boston, etc., Railroad, supra*; *Lord v. Polk Chemical Co.* (1895), 7 Del. Ch. 248, 44 Atl. 775. In view of these facts it is apparent that the statute creates a remedy in favor of an innkeeper which did not exist before, by giving him a lien against the property of a boarder as well as a guest, where such boarder is indebted to him for the services specified therein. 22 Cyc 1090; 14 R. C. L. 539. It also defines a right which theretofore existed

in his favor by enlarging it in some respects and restricting it in another. For the reasons stated it appears clear to us that the legislature in enacting the statute in question intended to cover the whole subject of the lien of innkeepers, and other persons mentioned therein, to provide a uniform right of lien for all of such persons, to define the same, and to supply an easy and adequate remedy for its enforcement. We therefore conclude that the enactment of the statute in question, by implication, abrogated the common-law lien in favor of innkeepers in this state. This conclusion finds support in the well-considered case of *Wyckoff v. Southern Hotel Co.* (1887), 24 Mo. App. 382, wherein the facts are strikingly similar, and in which the court said: "It would bring confusion and uncertainty into the law, to hold that a statute of this character can co-exist with the rule of the common law in respect of the lien of an innkeeper."

Appellant does not make any contention that he had a statutory lien as an innkeeper on the goods in question, and an examination of the special finding of facts discloses that any such contention would be unavailing. We therefore conclude that the court did not err in its conclusion of law, and that the judgment of the trial court must be sustained.

Judgment affirmed.

Dausman, C. J., Nichols and Remy, JJ., concur.
McMahan and Enloe, JJ., concur in result.

DAVIDSON ET AL. v. LEMONTREE ET AL.

[No. 9,840. Filed May 9, 1919. Rehearing denied October 17, 1919.]

1. *TIME.—Computation.—Motion for Change of Venue.—Time for Filing.—Rule of Court.*—Under §1350 Burns 1914, §1250 R. S. 1881, providing that time shall be computed by excluding the first day and including the last, a motion for change of venue from the county filed on the tenth day of the month, in a case set for trial on the fifteenth, was in time under a rule of court requiring all motions for a change of venue from the county to be filed at least five days before the day set for trial. p. 215.
2. *APPEAL.—Reversal.—Refusal of Change of Venue.*—Where the evidence is not in the record, the court on appeal cannot say whether substantial justice has been done, so that the cause must be reversed for error in refusing a change of venue. p. 216.

From Marion Superior Court (101,877) ; *Vincent G. Clifford*, Judge.

Action between Sarah Davidson and others and Fannie Lemontree and others. From the judgment rendered, the former appeal. *Reversed*.

William G. White and *Arthur A. Jones*, for appellants.

Isadore Wulfson, *Frank C. Groninger*, *Taylor E. Groninger* and *Ella M. Groninger*, for appellee.

McMAHAN, J.—This case was set for trial on May 15, 1916. On May 10 the appellants filed a verified motion for a change of venue from the county.

1. There was at that time a rule in force in the trial court requiring all motions for a change of venue from the county to be filed at least five days before the day on which the cause stands for trial on the trial calendar. The court overruled this motion for the reason that it was not filed five days before May 15. The motion was filed in time, and

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it should have been sustained. §1350 Burns 1914, §1250 R. S. 1881. The rule of the court did not require that five full days should intervene between the day on which the motion was filed and the day set for trial as was the case in *Fry v. Hoffman* (1913),

2. 54 Ind. App. 434, 102 N. E. 167, 103 N. E. 15.

Appellee suggests that, where it appears to the court that the merits of the cause have been fairly tried or determined, the cause should not be reversed. The evidence not being in the record, we are not able to say that substantial justice has been done.

Judgment reversed, with directions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion,

STATE OF INDIANA, EX REL. CRITTENBERGER, AUDITOR, v.
FARMERS AND MERCHANTS NATIONAL
BANK OF CICERO.

[No. 9,970. Filed October 17, 1919.]

1. **BANKS AND BANKING.**—*Payment of Note by Maker.*—*Failure to Apply to Note.*—*Insolvency of Bank.*—*Maker's Rights as Preferred Creditor.*—Where the maker of a note payable to a bank went to the bank to pay the same, and an officer of the bank, fraudulently concealing the fact that the note had been assigned to secure a loan, accepted the money and informed the maker that it would be applied to the payment of the note, the money so received did not belong to the bank or its creditors, and such maker was entitled to have his judgment against the bank for such money paid as a preferred claim. p. 221.
2. **JUDGMENT.**—*Collateral Attack.*—*Void Judgment.*—Though a judgment is erroneous, it is not subject to collateral attack, unless it is void. p. 222.
3. **JUDGMENT.**—*Conclusiveness.*—A judgment against the receiver

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of an insolvent bank to the effect that the judgment should be paid to the judgment creditor, and should be preferred and paid out of any assets in the hands of the bank in preference to any claims of the bank's creditors, was conclusive as between the same parties in the same court, or in any other court of concurrent jurisdiction, in any subsequent proceeding involving priority of claims, such judgment not having been appealed from. p. 222.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by the State of Indiana, on the relation of Dale J. Crittenberger, auditor, against the Farmers and Merchants Bank of Cicero, in which John C. Craig was appointed receiver for the bank. The receiver filed a petition to have the court determine what claims against the bank were preferred, and in what manner they should be paid, and Elmer E. Applegate intervened. From a judgment against Applegate on his intervening petition, he appeals. *Reversed.*

J. F. Neal and *N. C. Neal*, for appellant.

Joseph A. Roberts, for appellee.

NICHOLS, P. J.—Appellee, John C. Craig, hereinafter mentioned as appellee, was appointed receiver for the Farmers and Merchants Bank of Cicero, Indiana, by the Hamilton Circuit Court, in the case of State, ex rel. Dale J. Crittenberger v. Farmers and Merchants Bank of Cicero, Indiana, being the case in which this appeal is prosecuted. He was duly qualified as such receiver, and took possession of all the assets of said bank, January 22, 1915. Thereafter appellant, Elmer E. Applegate, hereinafter mentioned as appellant, by leave of court, brought suit against said appellee, by filing complaint in said Hamilton Circuit Court, to which appellee answered in

general denial, and the cause was submitted to the court for trial. At the request of the parties, the court rendered a special finding of facts, from which we have the following facts pertaining to matters in this appeal: On November 14, 1914, appellant executed to said F. and M. Bank his note in the sum of \$200, due ninety days after date. Said F. and M. Bank indorsed the note, with numerous others, to the Commercial National Bank of Indianapolis, Indiana, to secure a loan of \$17,000. Thereafter, to wit, on January 15, 1915, appellant called at said bank for the purpose of paying said note, and did pay to the president of said bank the amount due on the note. The president pretended to make a search for the note, but failed to find it, and then informed said appellant that he had mislaid it, and that he would apply the money to the payment of the note as soon as it could be found. Appellant had no knowledge, at the time of making said payment, that said note had been assigned to the Commercial National Bank, and the president concealed such fact from him. The money so paid by appellant was not applied to the payment of said note, nor was it put into the hands of said appellee as such separate fund, but it was absorbed into the assets of said bank before the receivership aforesaid. Said president knew that the note had been assigned to the Commercial National Bank, but fraudulently concealed such fact from appellant, and allowed him to pay in the money with the purpose of paying the note, under the belief that it was then held by said F. and M. Bank. When appellee took charge of the F. and M. Bank, he found therein \$868.98 in cash or in drafts and checks on solvent banks, payable to said bank, and there was

on hand continuously from January 15, 1915, more than the principal and interest of said note; the money paid in by appellant was by the bank wrongfully commingled with its funds, and remained therein. From January 15, 1915, to the time said appellee took charge of said bank, it received in deposits between \$15,000 and \$16,000, and during the same time paid out between \$18,000 and \$19,000. During all the time of said transactions, said bank was insolvent, and so continued till the time of the findings of fact. At said time other suits were pending, and other claims of a similar import to the one in suit remained to be adjusted, and the assets of said bank had not then been marshaled, and it could not then be determined whether said claims could be paid in full as preferred claims against the bank. The court then found that appellant was entitled to have his money returned to him to apply on said note then held by said Commercial National Bank, in the event that, upon the winding up of said concern, there were sufficient funds to pay him.

After conclusions of law, the following judgment was entered in said cause, to wit: "It is therefore ordered, adjudged and decreed by the court that the plaintiff, Elmer E. Applegate, recover of the defendant, John C. Craig, as receiver of The Farmers and Merchants Bank of Cicero, Indiana, the sum of \$201.49 and that the same is preferred as against the assets of said bank (not incumbered by any specific lien or liens) over the general creditors of said bank, and the plaintiff is hereby entitled to have the amount of the judgment hereby given paid and discharged in full by said receiver out of such assets."

On January 8, 1917, appellee commenced this action by filing his petition in said receivership proceeding, alleging therein that at the time the said F. and M. Bank closed its doors there came into said appellee's hands \$482.23 in cash, and cash items that were afterward collected to the amount of \$386.75; that appellant had recovered said judgment for \$201.49 as a preferred claim; that other parties had been allowed preferred claims; and that others were asserting that their claims were preferred. The receiver prayed the court to determine what claims were preferred, and in what manner they should be paid.

Appellant appeared and filed his intervening petition, averring therein his judgment for \$201.49, and that by the terms of said judgment the amount thereof was a preferred claim as against all the assets of said bank, not incumbered by any specific lien, over the general creditors of said bank, and that he was entitled to have the amount of his said judgment paid in full by the appellee out of the assets; that said judgment was unappealed from, and in full force and effect, and that there had come into the hands of said appellee enough money to pay the judgment and interest, costs of this action, all expenses of the receivership, and any and all preferred claims against said receivership.

Trial was had on said appellee's petition, and appellant's intervening petition, and the court found on appellee's petition that appellant was entitled to a preferred claim in the sum of \$201.49, and that there were other preferred claims, designating them, to the amount of \$2,610.18, but that said preferred claims, including appellant's, were only preferred as to their proportionate share of said sum of \$482.23,

cash on hand when appellee was appointed as such receiver, and as to the balance of their claims after said \$482.23 was exhausted, they should share on equal terms with the general creditors, and the court found against the appellant on his intervening petition. Judgment was rendered accordingly, from which judgment after appellant's motion for new trial was overruled, appellant prosecutes this appeal, assigning for error the action of the court in overruling his motion for a new trial, in which it is specified that the decision of the court is contrary to law, and the decision of the court is not sustained by sufficient evidence.

The appellee testified that he had on hands funds derived from the assets of said F. and M. Bank, more than sufficient to pay all preferred claims in

1. full, as well as costs and expenses of the receivership. It was out of these assets that the judgment in favor of the appellant in the first suit directed that appellant's claim should be paid. This judgment was right. As appeared by the special findings of fact, appellant's money was traced into the funds of the bank, and while it could not be specifically traced further, it necessarily follows that such money was used either to pay debts of the delinquent bank, or to augment its assets. The relation between the appellant and the bank was fiduciary, and the action of the bank in so concealing the facts as to the assignment of the note, and in misappropriating appellant's money, was fraudulent, and the bank or its receiver and creditors cannot profit thereby. The money did not belong to the bank, nor to the creditors, and restoring it to its rightful owners could not harm them. *Massey v. Fisher* (1894), (C. C.)

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62 Fed. 958; *People v. City Bank, etc.* (1884), 96 N. Y. 32; *Carley v. Graves* (1891), 85 Mich. 483, 48 N. W. 710, 24 Am. St. 99; *McLeod v. Evans* (1886), 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; *Mich. S. S. Co. v. Thornton* (1905), 136 Fed. 134, 69 C. C. A. 132. *Windstanley v. Second Nat. Bank, etc.* (1895), 13 Ind. App. 544, 41 N. E. 956, and *Shoptert v. Indiana Nat. Bank* (1908), 41 Ind. App. 474, 83 N. E. 515, both cited by appellee, are not out of harmony with this principle as a careful reading will disclose.

Even if the judgment were erroneous, there is nothing in the record that shows that it was void for any reason, and it was therefore not subject

2. to collateral attack. *Exchange Bank v. Ault* (1885), 102 Ind. 322, 1 N. E. 562; *Spencer v. Spencer* (1903), 31 Ind. App. 321, 67 N. E. 1018,

3. 99 Am. St. 260; *Trelkeld v. Allen* (1892), 133 Ind. 429, 32 N. E. 576. The judgment was directly on the point involved in this action, and is therefore conclusive between the same parties in the same court, or in any other court of concurrent jurisdiction. *Thompson v. Reasoner* (1890), 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495; *Jarrel v. Brubaker* (1898), 150 Ind. 260, 272, 49 N. E. 1050; *Isbell v. Stewart* (1890), 125 Ind. 112, 25 N. E. 160; *Patterson v. Ward* (1898), 8 N. D. 87, 76 N. W. 1046; *Peay, Rec., v. Duncan* (1859), 20 Ark. 85; *Wingate v. Haywood* (1860), 40 N. H. 437; *Axford v. Graham* (1885), 57 Mich. 422, 24 N. W. 158. It cannot be relitigated by an original proceeding, but must be corrected in error or by appeal. *Anthony v. Halderman* (1871), 7 Kan. 50.

The judgment of the court is contrary to law, and is reversed, with instructions to grant a new trial.

Marion, etc., Traction Co. v. Reese—71 Ind. App. 223.

MARION AND BLUFFTON TRACTION COMPANY v. REESE.

[No. 9,920. Filed October 17, 1919.]

RAILROADS.—Crossing Accidents.—Injury to Passenger in Automobile.—Liability.—Contributory Negligence.—One riding as a passive guest in another's automobile, which was struck by an interurban car on a public highway crossing, was not chargeable with contributory negligence.

From Wabash Circuit Court; *Nelson G. Hunter*, Judge.

Action by Martha Reese against the Marion and Bluffton Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Abram Simmons, Charles G. Dailey, John J. Kelly and Plummer, Todd & Plummer, for appellant.

Herman N. Hipkind, Fred H. Bowers and Milo N. Feightner, for appellee.

McMAHAN, J.—Appellee, while riding in an automobile as the guest of another, was injured at a public highway crossing when the automobile in which she was riding was struck by one of appellant's cars, and she sues for damages.

The first paragraph of complaint alleges that the appellant negligently operated the car which injured appellee. The second paragraph is similar to the first, with the additional allegations that, when appellee discovered her peril, she was unable to extricate herself from the dangerous position; that appellant knew the dangerous character of the highway crossing, and in the exercise of reasonable care could have seen appellee and her peril in time to have avoided the injury; that appellant negligently failed

to watch the crossing and to stop its car. The third paragraph is also similar to the first, except that it contains the further allegations that the appellant knew the dangerous character of the highway crossing, and saw appellee, and that she was in a position of peril, in time to have stopped his car and avoided injuring her. The jury returned a verdict for appellee, and also answered a number of interrogatories.

The errors assigned are that the court erred in overruling appellant's motion for judgment on the interrogatories, and in overruling its motion for a new trial. It is the contention of appellant that the facts found by the jury in answer to the interrogatories are inconsistent with the general verdict, in that they show that appellee was guilty of contributory negligence, and that the court therefore erred in overruling its motion for judgment *non obstante*.

The law as to when the answers to interrogatories are sufficient to overthrow the general verdict is so well settled that it is needless for us to enter into a discussion of that subject. It is sufficient to say that the facts found are entirely consistent with, and in fact support, the general verdict.

Appellant insists that the verdict is not sustained by sufficient evidence, and is contrary to law, for the reason that appellee's negligence was the proximate cause of her injury. We cannot agree with this contention. Without going into the evidence in detail, it is sufficient to say that it is shown by the evidence that appellee was a passive guest in an automobile which was driven by a friend. She was sitting in the rear seat with her husband and two children at the time of the accident. The driver of the automobile and his wife were sitting in the front seat. The top

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of the automobile was up and the doors were closed. We have carefully read the testimony of all the witnesses, and find that the verdict of the jury is amply supported by the evidence and is not contrary to law. *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383.

Appellant also insists that the answers which the jury made to certain interrogatories are not supported by sufficient evidence. Appellant has failed to set out the interrogatories complained of, or the answers thereto. No information is given us concerning the nature of said interrogatories or their answers. It does not appear that, if said interrogatories had been answered differently, the general result would be changed. Objection is made to instructions Nos. 1 to 8, given at the request of appellee. From the examination of these instructions, we hold that none of them are open to the objection urged. It was proper, under the last paragraph of complaint and the evidence, to instruct the jury on the doctrine of last clear chance.

There being no reversible error shown, the judgment is affirmed.

KINTZ v. STATE OF INDIANA, EX REL. HUNTER.

[No. 10,089. Filed October 28, 1919.]

1. *APPEAL.—Term-Time.—Failure to Perfect.—Vacation Appeal.—*

Where a party has attempted to perfect a term-time appeal under §679 Burns 1914, §638 R. S. 1881, but has omitted some essential requirement, he will be deemed to have abandoned his appeal in term; but, if the transcript has been filed, with an appropriate assignment of errors, the appeal becomes a vacation appeal. p. 227.

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2. **APPEAL.—Vacation.—Requisites.—Notice of Appeal.**—The notice of a vacation appeal required by §681 Burns 1914, §640 R. S. 1881, must be given, unless waived, where an abandoned term-time appeal is treated as a vacation appeal. p. 228.
3. **APPEAL.—Vacation.—Notice of Appeal.—Waiver.**—The filing of a brief by appellee on the merits, or a joinder in error, waives notice of a vacation appeal. p. 228.
4. **BASTARDS.—Actions.—Instructions as to Opportunity.**—In a bastardy proceedings, an instruction that, in determining whether the parties had sexual intercourse, the jury might consider their opportunities for so doing, and certain facts recited, in ascertaining whether such opportunity existed, when taken in connection with an instruction that a preponderance of the evidence was all that was necessary to establish the case against defendant, *held* not to authorize a recovery on a preponderance of evidence as to opportunity, in view of other instructions stating what facts must be proved before plaintiff could recover. pp. 228, 229.
5. **BASTARDS.—Actions.—Instructions as to Opportunity.**—In a bastardy proceeding, it is proper to instruct the jury on the question of opportunity for sexual intercourse. p. 229.
6. **BASTARDS.—Actions.—Incomplete Instruction.—Cure by Other Instructions.**—In a bastardy proceeding, an instruction that a preponderance of the evidence was sufficient to establish the case, *held* not erroneous because failing to state that all the material allegations of the complaint must be proved by such preponderance, in view of other instructions given. pp. 229, 230.
7. **BASTARDS.—Actions.—Degree of Proof Required.**—Prosecutions for bastardy are civil actions, and a preponderance of the evidence is sufficient to establish the affirmative of any issue. p. 230.
8. **BASTARDS.—Actions.—Instructions.—Credibility of Relatrix.**—In a bastardy proceeding, a requested instruction that, in determining what weight should be given the testimony of the relatrix, the jury might consider the fact that by her own testimony she showed immorality and want of chastity, was properly refused, where the only immorality and want of chastity so shown was that involved in her relations with defendant about the time she claimed the child was begotten, which was about two years before trial, since, while it would have been proper for the jury to consider such want of chastity in determining the moral character of the relatrix at the time she testified, as affecting her credibility as a witness, the instruction might have improperly led the jury to believe that it was conclusive as to her character at the time of trial. p. 230.

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9. WITNESSES.—*Credibility.—Relatrix in Bastardy Proceeding.—Moral Character.*—While the moral character of a relatrix in a bastardy suit may be proved as affecting her credibility as a witness, such character must relate to the time she testifies. p. 230.
10. BASTARDS.—*Actions.—Admonitory Instructions.—Discretion of Trial Court.*—In a bastardy proceeding, it was within the discretion of the trial court to refuse a requested admonitory instruction that each juror must be convinced by a preponderance of the evidence that defendant was the father of relatrix' child, and should not consent to a verdict unless so convinced. p. 231.

From Vermillion Circuit Court; *Barton S. Aikman*, Judge.

Action by the State of Indiana, on the relation of Rosa L. Hunter, against Norbert C. Kintz. From a judgment for relator, the defendant appeals. *Affirmed.*

Orion B. Harris, for appellant.

Everett A. Davison, Homer B. Aikman and Beasley, Douthitt, Crawford & Beasley, for appellee.

BATMAN, C. J.—This is an action for bastardy, in which it is charged that appellant is the father of the child of the relatrix. No answer was filed. The cause, on reaching the circuit court, was submitted to a jury for trial, resulting in a verdict and judgment against appellant. Prior to the rendition of judgment, appellant filed a motion for a new trial, which was overruled, and has assigned this action of the court as the sole error on which he relies for reversal.

Appellee calls our attention to the fact that appellant has attempted to perfect this appeal under the provisions of §679 Burns 1914, §638 R. S.

1. 1881, but has not succeeded by reason of his failure to file the transcript in the office of the clerk of this court within sixty days after filing his

appeal bond, as therein provided. It is well settled that, where a party has attempted to perfect a term-time appeal, but has omitted some essential requirement in that regard, he will be deemed to have abandoned his appeal in term, but where the transcript has been filed, with an appropriate assignment of errors, it becomes a vacation appeal. *Burns v. Trustees, etc.* (1903), 31 Ind. App. 640, 68 N. E. 915; *Kellogg v. Ridgely* (1907), 40 Ind. App. 423, 81 N. E. 1158. In such an appeal notice must be given as required by §681 Burns 1914, §640 R. S. 1881,

2. unless the same is waived. The filing of a brief by appellee on the merits of the appeal, or a joinder in error, is a waiver of notice.
3. *Hazleton v. De Priest* (1896), 143 Ind. 368, 42 N. E. 751; *Lowe v. Turpie* (1897), 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Cleveland, etc., R. Co. v. Smith* (1912), 177 Ind. 524, 97 N. E. 164. In the instant case appellee waived the service of notice in each of the ways stated, and this court thereby acquired jurisdiction of the appeal. Appellee also calls attention to certain omissions in the index to the transcript. While the index is not as complete as it might be, still the omissions suggested by appellees would not warrant our refusal to consider the merits of the appeal on that account.

While appellant has assigned a number of reasons for a new trial in his motion therefor, the only ones presented and relied on for reversal relate to

4. the action of the court in giving instructions Nos. 4 and 5, on the request of appellee, and in refusing to give instructions Nos. 10 and 15, requested by appellant. The court, by said instruction No. 4, informed the jury that, in determining whether

or not appellant and the relatrix had sexual intercourse as charged, it might consider their opportunities for so doing, and called attention to certain facts, which, if proved, they might take into consideration in determining whether such opportunity existed. Appellant contends that the question of opportunity for sexual intercourse was not within the issues, and that said instruction, when taken in connection with No. 5, set out below, had the effect of leading the jury to believe that a preponderance of the evidence

on the question of whether appellant and the
5. relatrix had opportunity for sexual intercourse would entitle appellee to recover. It has been held proper to instruct the jury on the question
4. of opportunity for sexual intercourse in actions of this kind. *Goodwine v. State, ex rel.* (1892), 5 Ind. App. 63, 31 N. E. 554. There is no reasonable basis for appellant's remaining contention, in view of other instructions given on the question of what should be proved before appellee would be entitled to recover. There was no error in giving said instruction.

Instruction No. 5 reads as follows: "A prosecution for bastardy is a civil action in which a preponderance of the evidence is all that is necessary to establish the case against the defendant."

Appellant contends that this instruction is erroneous for failing to state that all the material allegations of the complaint must be established by

6. such preponderance, and that its effect was to lead the jury to believe that a mere preponderance of the evidence, even though it was not sufficient to establish such material allegations, would entitle appellee to recover. These contentions cannot

be sustained. It has long been settled in this

7. state that prosecutions for bastardy are civil actions, and that a preponderance of the evidence is all that is necessary to establish the
6. affirmative of any issue connected therewith.

Walker v. State (1841), 6 Blackf. 1; *Harper v. State, ex rel.* (1885), 101 Ind. 109; *Reynolds v. State, ex rel.* (1888), 115 Ind. 521, 17 N. E. 909. While the instruction might have been enlarged so as to obviate the objections urged against it, still the failure to do so did not render its giving error in view of instruction No. 1, given at the request of appellee, and instructions Nos. 2, 3, and 9, given at the request of appellant.

Appellant complains of the action of the court in refusing to give instruction No. 10, requested by him.

The first part of said instruction was fully

8. covered by instruction No. 12, given on request of appellant. The latter part of said instruction contains the following statement: "In this case the relatrix, by her own testimony, shows immorality and want of chastity, which fact you may consider in determining what weight you should give her testimony." It is well settled that, while the moral character of a relatrix in a bastardy suit may be proved, as affecting her credibility as a witness, such character must relate to the time she testifies. *Meyncke v. State, ex rel.* (1879), 68 Ind. 401; *Gemmill v. State, ex rel.* (1896), 16 Ind. App. 154, 43 N. E. 909. The only testimony of the relatrix which could be said to show her immorality and want of chastity was that relating to her sexual intercourse with appellant during the time and shortly after she claims her child

was begotten, which was almost two years prior to the time she testified on the trial. While it would have been proper for the jury to consider such fact, in determining the moral character of the relatrix at the time she testified, as affecting her credibility as a witness, it would not be conclusive as to her character at such time, as the jury might have understood the instruction to imply, had it been given. For this reason the court did not err in refusing to give the instruction.

Appellant also complains of the action of the court in refusing to give instruction No. 15, requested by him. It reads as follows: "I have said to you

10. that to entitle the plaintiff to a verdict in this case, the evidence must show by a preponderance thereof that the defendant is the father of the child. This means that the mind of each juror must be convinced of that fact by a preponderance of the evidence and while it is proper for the jurors to discuss the evidence, in the jury room, and try to reconcile the evidence, if there is any conflict, yet it would be wrong for any juror to consent to a verdict unless his own mind is convinced by a preponderance of the evidence that the defendant is the father of the child."

It will be observed that this instruction is in the nature of an admonition to the jury with reference to its duty in considering the evidence and arriving at a verdict. It has been held that the giving of instructions of this character must necessarily be largely a matter of discretion with the trial court. 38 Cyc 1762; *Pittsburgh, etc., R. Co. v. Collins* (1907), 168 Ind. 467, 80 N. E. 415; *Pfaffenback v. Lake Shore, etc., R. Co.* (1895), 142 Ind. 246, 41 N. E. 530; *Birming-*

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ham Fire Ins. Co. v. Pulver (1888), 126 Ill. 329, 18 N. E. 804, 9 Am. St. 598. The cases cited by appellant do not indicate the contrary. We conclude that the court did not commit reversible error in refusing to give said instruction.

We find no reversible error in the record. Judgment affirmed.

CITY OF NEW ALBANY v. STALLINGS.

[No. 10,093. Filed October 28, 1919.]

1. MUNICIPAL CORPORATIONS.—*Sidewalks.—Defects.—Observation.*—A traveler has the right to assume that city sidewalks are reasonably safe for travel; and though he must use his faculties for observation in an ordinary and reasonable way proportionate to the dangers apprehended, this does not require an active search for defects, nor a constant expectation of danger, and he is not necessarily guilty of negligence as matter of law in failing to observe an open defect, especially when his attention is diverted by some sufficient cause. p. 236.
2. MUNICIPAL CORPORATIONS.—*Defective Sidewalk.—Personal Injuries.—Contributory Negligence.*—Since the enactment of §362 Burns 1914, Acts 1899 p. 62, contributory negligence is a matter of defense in an action against a city for personal injuries caused by a defective sidewalk. p. 236.
3. MUNICIPAL CORPORATIONS.—*Sidewalks.—Personal Injuries.—Negligence.*—In an action for personal injuries from a fall occasioned by a defective condition of a sidewalk used as much as any other in the city, where it consisted of bricks, loosely laid without sand or other filler, on a slope two feet long, descending five or six inches, where by the ordinary use of the sidewalk spaces of two to three inches were occasioned between the bricks, and such condition had existed for several weeks, negligence on the part of the city was a question of fact for the jury. p. 237.
4. MUNICIPAL CORPORATIONS.—*Sidewalks.—Personal Injuries.—Contributory Negligence.*—In an action for personal injuries

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from a fall occasioned by a loose brick and hole between bricks in a sidewalk, where the plaintiff did not see the loose brick or know of the hole, but was giving her attention to a vegetable display along the sidewalk, which was one traveled as much or more than any other in the city, the question of contributory negligence was one of fact for the jury. p. 237.

5. **APPEAL.—Negligence.—Contributory Negligence.—Evidence.—Sufficiency.**—In an action involving negligence and contributory negligence where under the evidence they are both questions for the jury and where there is evidence to support the verdict, it cannot be disturbed on appeal. p. 237.
6. **APPEAL.—Damages.—Conflicting Evidence.**—Where in an action for personal injuries there is conflicting evidence as to whether plaintiff was ruptured by falling at the time complained of or had previously been ruptured, the question is one for the jury. p. 237.
7. **DAMAGES.—Amount.—Review.**—The Appellate Court cannot say that a verdict for \$1,650 is excessive or due to improper influences where the plaintiff has sustained a fall during which she struck her hand upon a wooden bench, sprained her thumb and wrist, twisted her body and suffered a rupture, and was permanently injured thereby. p. 237.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by Amelia Stallings against the city of New Albany. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Charles L. Jewett, Henry E. Jewett and Walter E. Jewett, for appellant.

Evan B. Stotsenburg and John H. Weathers, for appellee.

McMAHAN, J.—Action by appellee to recover damages alleged to have been sustained by reason of a defective sidewalk. There was a verdict and judgment in her favor for \$1,650. Appellant's contentions are that the court erred in overruling its motion for a new trial for the reasons: (1) That the verdict

is not sustained by sufficient evidence; and (2) that the damages are excessive.

Appellee while walking along the sidewalk on one of the public streets in the city of New Albany, in front of a grocery store, saw some beans displayed in front of the store, and, in turning and walking toward the store, she stepped upon a loose brick in the sidewalk, which slipped or turned under her weight and her foot slipped into a hole in the walk where another loose brick had been misplaced and knocked out by people walking over the sidewalk. When her foot slipped into this hole, she started to fall, and in falling she struck her hand on a bench or some hard substance and sprained her thumb and ankle, hurt her foot, and suffered a rupture so that she is required to wear a truss. She did not see the loose brick or know there was a hole in the walk. The sidewalk where she was injured was traveled as much or more than any of the other sidewalks in the city. The sidewalk immediately in front of the grocery store where she was hurt was new and made of concrete, while the walk in front of the adjoining building and over which she had just passed was made of brick and was five or six inches higher than the concrete walk. When the concrete walk was constructed, the workmen took up the brick walk for a distance of two feet and made a slope from the brick walk down to the concrete walk.

The condition of the sidewalk is best told by the witness Justice A. Kraft, who was a councilman at large in the city of New Albany at the time of the accident. He says in substance that, when the sidewalk was built in front of the grocery store, it was built five or six inches lower than the sidewalk in

front of the building next to it, and the men made a slope down to the concrete walk, and laid the brick back in. On account of people walking over these brick, sometimes they would be out and sometimes be put back in again. These brick were loose, and when travelers stepped on them they sometimes would get knocked out, or kicked out of place. There was nothing on the concrete sidewalk to hold them. When these brick were first put in on this slope they were laid close together, sometimes they were scattered along and sometimes they were close together. Witness on one occasion, with his foot, moved a brick over to make it smooth. The brick could be moved to and fro with one's foot; and, when some of them were out and, after people had walked over them, there would be spaces of two to three inches between the brick, and the brick would probably turn when people walked over them. The sidewalk was nine feet wide, and this slope extended all the way across the walk; the brick were not laid in sand or anything, and were not as tight as they should have been.

The evidence also showed that this condition was temporary; that the brick walk was to be taken up and a new concrete walk built in its place at a level with the concrete walk in front of the grocery store. The sidewalk when the accident happened had been in the condition described from three to five weeks before the time appellee was injured. Appellee, her husband and daughter testified that she was not ruptured prior to this accident. A number of her neighbors and acquaintances testified that they had known her for years and never knew she was ruptured, and never heard her complain of being ruptured. Her family physician testified that he never heard of it,

and in his opinion the rupture was a recent one. Two witnesses testified that about five years before this accident appellant told them that she was ruptured and showed the rupture to them, and that she was wearing a truss at that time. This was denied by appellee.

Appellant contends that there can be no recovery for the reason that appellee was guilty of contributory negligence. The facts in this case are sim-

1. ilar to those in *City of Valparaiso v. Schwerdt* (1907), 40 Ind. App. 608, 82 N. E. 923, where the court held that a person walking along a sidewalk in a public street is required to use his faculties for observation in an ordinary and reasonable way, proportionate to the dangers apprehended, but that he has the right to assume that the sidewalk is reasonably safe for travel, and he is neither obliged to make an active search for defects, nor to look for danger at every step. He has the right to assume that the city and its officers have done their duty, unless there is some notice to put him on guard, and he is not necessarily guilty of negligence as a matter of law in failing to observe even an open defect. This rule is especially applicable when the traveler's attention is diverted by some sufficient cause.

Appellant contends that the facts in this case are practically the same as the facts in *City of Huntingburgh v. First* (1896), 15 Ind. App. 552, 43

2. N. E. 17. It will be observed, however, that the case cited was decided prior to the enactment of §362 Burns 1914, Acts 1899 p. 62, and that at that time a plaintiff was required to allege and prove want of contributory negligence. As the law now stands, contributory negligence in a case of this kind

is a matter of defense. The case just cited is therefore not in point.

The question of negligence on the part of appellant, as well as on the part of appellee, was a question of fact for the jury, and, there being evidence 3-7. to support the verdict, we cannot disturb it.

The character and extent of appellees' injuries were questions for the jury. She alleged that in falling she struck her hand upon a wooden bench; that she sprained her thumb and wrist; that she twisted her body and suffered a rupture, and that said injuries were permanent. The jury by their verdict found these allegations to be true, and we cannot say that the amount of the verdict is such as leads to the conclusion that the jury was subject to some improper influence.

There was no error in overruling the motion for a new trial. Judgment affirmed.

WEESNER, ADMINISTRATOR, v. WEESNER.

[No. 10,091. Filed October 28, 1919.]

1. LIMITATION OF ACTIONS.—*Statute.*—*Operation.*—*Continuous Contract May be Express or Implied.*—In determining the question whether a contract of hire was continuous, as affecting the running of the statute of limitations, it makes no difference whether the contract was express or implied. p. 240.
2. EXECUTORS AND ADMINISTRATORS.—*Claims Against Estates.*—*Action on Implied Contract of Hire.*—*Jury Questions.*—In an action on a claim against decedent's estate for services rendered decedent in which claimant sought recovery on the theory of an implied contract, it was for the jury to determine whether claimant performed services for deceased at his request, or whether he availed himself thereof knowing, or having reasonable ground to believe, that compensation was expected. p. 240.

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3. EXECUTORS AND ADMINISTRATORS.—*Services Rendered Decedent.—Contract of Hire.—When Implied.*—If services were performed at the request of decedent, or, if he knowingly availed himself thereof and had reasonable ground to believe that compensation therefor was expected, the law will imply a promise to pay what such services are reasonably worth. p. 240.
4. EXECUTORS AND ADMINISTRATORS.—*Services Rendered Decedent.—Contract of Hire.—When Implied.*—If the circumstances authorized the person rendering services to decedent reasonably to expect payment therefor, or by way of furtherance of the intention of the parties, or because reason and justice require compensation, the law will imply a contract therefor. p. 240.
5. LIMITATION OF ACTIONS.—*Statute.—Operation.—Continuity of Contract of Hire.—How Determined.*—The test of "continuity" of services rendered so as to take a case out of the operation of the statute of limitations does not depend so much upon continuous day-by-day performance, but rather upon whether all the services were performed under one contract, either express or implied, with no definite time fixed for payment, or whether they were rendered under several separate contracts. p. 241.
6. EXECUTORS AND ADMINISTRATORS.—*Claims Against Estate.—Implied Contract of Hire.—Continuous Services.*—In an action on a claim against a decedent's estate for compensation for services performed by claimant for her father-in-law during a period of about ten years, the action being based on the theory of an implied contract of hire, evidence held to sustain verdict for plaintiff, both as to the implied contract by deceased to pay for the services and as to the services being continuous. p. 241.
7. HUSBAND AND WIFE.—*Wife's Right to Separate Earnings.*—A wives' separate earnings for services other than those rendered to the family belong to her, and, where she had performed services, it is a question of fact whether she contributed them as services for her husband or family, or performed them pursuant to an agreement between herself and the stranger for whom they were rendered. p. 242.

From Wabash Circuit Court; *Nelson G. Hunter*, Judge.

Action by Elizabeth Weesner on a claim against the estate of Allen Weesner, deceased, opposed by D. E. Weesner, administrator. From a judgment for plaintiff, the administrator appeals. *Affirmed.*

Weesner, Admr., v. Weesner—71 Ind. App. 237.

A. H. Plummer, Walter G. Todd and Franklin W. Plummer, for appellant.

D. F. Brooks, for appellee.

ENLOE, J.—The appellee filed a claim against the estate of Allen Weesner, deceased, for services alleged to have been rendered by her to decedent, in his lifetime. The claim, not being allowed, was transferred to the issue docket for trial. Answer was filed in four paragraphs: (1) General denial; (2) six years' statute of limitations; (3) payment; (4) set-off. The cause was submitted to a jury, which returned a verdict in favor of appellee in the sum of \$875, upon which judgment was rendered.

The only error assigned and relied upon is the action of the court in overruling appellant's motion for a new trial.

The reasons assigned therein, which we are called upon to consider on this appeal, are the following: (a) The verdict is not sustained by sufficient evidence; (b) error in admitting certain testimony; (c) error in excluding certain offered testimony; (d) error in giving instruction No. 6, requested by appellee; (e) error in giving instruction No. 10, requested by appellee.

The appellant insists that his first and second points above are well taken, because the evidence does not show that the services of appellee, rendered to him during the last six years of his decedent's life, were worth \$875, the amount of the verdict; and that therefore the verdict for this amount is not sustained by sufficient evidence and is excessive.

The theory of appellant is that, because the services rendered were not rendered continuously, in fact, but rendered at different times and covering

different periods, they were not therefore

1. "continuous services" within the meaning of the law, and that therefore, at most, only those services rendered within the last six years next preceeding the death of Allen Weesner could be recovered for. In determining the question of continuity, it makes no difference whether the contract was express or implied. *Crampton v. Logan* (1902), 28 Ind. App. 405, 63 N. E. 51.

No express contract to pay for the services rendered and for which this claim was filed was alleged, or attempted to be proved. Appellee's case

2. proceeded upon the theory of an implied contract, and it therefore became a question of fact for the determination of the jury whether the appellee did work or perform service for said Allen Weesner at his request; or, whether Allen Weesner knowingly availed himself thereof and accepted the benefits therefrom, knowing, or having reason-

3. able grounds to believe, that appellee was expecting compensation therefor, he not being a member of the family of appellee, for, if such were the facts, the law will imply the promise to pay therefor what such services were reasonably worth.

If the circumstances authorized the person rendering the services reasonably to expect payment therefor, by way of furtherance of the inten-

4. tion of the parties, or because reason and justice require compensation, the law will imply a contract therefor. *Crampton v. Logan, supra. Eppert v. Gardner* (1911), 48 Ind. App. 188, 93 N. E. 550.

The test of "continuity," so as to take the case

out of the operation of the statute, seems not to depend so much upon continuous day-by-day

5. performance, but rather is to be determined by the answers to the following questions:

Were all the services performed under one contract, whether express or implied, with no definite time fixed for payment, or were they rendered under several separate contracts? In *Crompton v. Logan, supra*, it was said: "Where no certain time is fixed for payment, or when the contract shall end, or where, as in this case, the evidence tends to support the theory that compensation was to be made to appellee at the death of Knight, if not before, the contract, whether express or implied, should be considered and treated as a continuous one, and the statute of limitations would not begin to run until the services were ended."

In this case there is evidence in the record tending to show the following facts: That Allen Weesner, at the time of his death in 1914, was more than

6. ninety years of age; that he was feeble in body and hard of hearing; that he was for several years prior to his death afflicted with disease of kidneys and had no power, by reason thereof, to control his urine; that after the death of his wife he was left alone, and had no one to look after and care for him, or for his house and home; that he continued to stay at his own home for a time, and while so doing appellee prepared and took to him his meals, and cared for his room, bed and clothing; that he also stayed for a time at the home of his son Wallace Weesner, husband of appellee, and while there the appellee cared for and waited upon him, kept his room, at her home, and also looked after the care of

his own home; that he also stayed for a short time in the home of another son, but spent most of the time, after the death of his wife, either at his own home, or at the home of the said son, Wallace; that he died at the home of his said son, Wallace.

The claim was for services covering a period of about ten years, and there is ample evidence in the record to sustain the verdict of the jury, both as to the implied contract by deceased to pay for same, and as to said services being continuous.

The objections by appellant to certain testimony were based upon the assumption that the six-year statute of limitations applied, on the theory that the services were not continuous. What we have heretofore said disposes also of this contention. The court did not err in the matter of receiving or excluding any of the testimony complained of by appellant.

Appellant next urges that the court erred in giving instructions Nos. 6 and 10, of those requested by appellee. Appellant's objection to those instructions

is predicated upon the theory that, as appellee

7. and her husband were living together, what she did for the deceased she did not do as a separate business of her own, but as a part of her husband's business, and that therefore she can have no independent claim.

In the case of *Kennedy v. Swisher* (1905), 34 Ind. App. 676, 73 N. E. 724, it was said: "While the statute does not relieve a married woman from the duty of personal service for her husband and family, it vests in her the ownership of earnings which accrue from her services for others. * * * She having performed the services, it was a question of fact whether she contributed them as services for her hus-

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band or family, or performed them pursuant to an agreement between herself and the stranger for whom they were rendered." See, also, *Hamilton v. Estate of Hamilton* (1901), 26 Ind. App. 114, 59 N. E. 344.

There is no evidence in this record that would have warranted the jury in finding that appellee had been paid for her said services.

There has been no error presented, and the judgment is therefore affirmed.

CITY OF INDIANAPOLIS v. BYRNE ET AL.

[No. 10,100. Filed October 28, 1919.]

MUNICIPAL CORPORATIONS.—Streets.—Location of Place of Injury.—Evidence.—In an action against a city for personal injuries sustained from a defect in a street, the location of such defect within the corporate limits of the city may be shown by the testimony of the plaintiff.

From Marion Superior Court (95,937); *V. G. Clifford*, Judge.

Action by Joseph Byrne against the city of Indianapolis and another. From a judgment in favor of the plaintiff against the city, the defendant city appeals. *Affirmed.*

William A. Pickens, Walter Myers, Edward Hohli, Russell J. Ryan and Paul G. Davis, for appellant.
George W. Galvin, for appellee.

BATMAN, C. J.—Joseph Byrne commenced this action against the city of Indianapolis and the Vandalia Railroad Company to recover damages for personal

injuries alleged to have been sustained by reason of a defect in South Belmont avenue, a street in said city along its western boundary. After the cause had been put at issue by the filing of general denials, it was submitted to a jury for trial, resulting in a verdict against both defendants for the sum of \$200. Each defendant filed a motion for a new trial, the motion of the city being overruled, and the motion of the railroad company being sustained. The court rendered judgment against the city on the verdict, from which judgment it now appeals and has assigned the action of the court in overruling its motion for a new trial as the sole error on which it relies for reversal.

The only error presented by this appeal relates to the action of the court in permitting appellee Byrne, while testifying as a witness on his own behalf, to answer the following question over appellant's objection, and in refusing to strike out the answer thereto: "Was this place you fell into, this rut or wash-out, in the city of Indianapolis?" Answer, "Yes." The record discloses that the purpose of this question and answer was to show that the place at which the witness received his alleged injury was within the corporate limits of said city. The question and answer were proper for such purpose, and the court did not err in its rulings with reference thereto. *McKeen v. Haskell* (1886), 108 Ind. 97, 8 N. E. 901; *Shea v. City of Muncie* (1897), 148 Ind. 14, 46 N. E. 138; *Indianapolis Union R. Co. v. Waddington* (1907), 169 Ind. 448, 82 N. E. 1030; *New York, etc., R. Co. v. Lind* (1913), 180 Ind. 38, 102 N. E. 449; *Wabash R. Co. v. Gretzinger* (1914), 182 Ind. 155, 104 N. E. 69. These authorities render a discussion of the question unnecessary. Appellant cites the case of *Miller v. City of*

Home Packing, etc., Co. v. Cahill—71 Ind. App. 245.

Valparaiso (1893), 10 Ind. App. 22, 37 N. E. 418, in support of its contention, but it is sufficient to say in answer thereto that, while the method of proof there suggested might have been followed, it was not necessary to do so, as shown by the authorities cited.

We find no error in the record. Judgment affirmed.

HOME PACKING AND ICE COMPANY ET AL. v. CAHILL.

[No. 10,488. Filed May 29, 1919. Rehearing Denied October 29, 1919.]

1. **MASTER AND SERVANT.—Workmen's Compensation.—Agreement as to Compensation.**—The employer cannot complain of an agreement for compensation, duly approved and being performed under the Workmen's Compensation Act, on the ground that such agreement is incomplete in that it makes no provision for the injured employe during any possible period of partial disability. p. 247.
2. **MASTER AND SERVANT.—Workmen's Compensation.—Appeals.—Enforcing Award.**—An appeal from a ruling by the Industrial Board, denying employer's petition to set aside an agreement for compensation and ordering a resumption of payments thereunder, does not challenge the power of the board to make the order of resumption on the ground that the sole power to enforce an award rests in the circuit court. p. 248.
3. **MASTER AND SERVANT.—Workmen's Compensation.—Agreement as to Compensation.—Conclusiveness.—Setting Aside.**—An agreement which has been made under and in compliance with the Workmen's Compensation Act, which has been approved by the Industrial Board, and under which payments have been made, cannot be set aside on the petition of the employer and his insurer, based on the general ground that the injury did not arise out of and in the course of the employment, where petitioners do not claim that there was any mistake as to any specific fact but merely seek to challenge their conclusion as to this element of the agreement, since the agreement is a confession of liability and has by the board's approval the force and effect of an award. p. 248.

Home Packing, etc., Co. v. Cahill—71 Ind. App. 245.

From the Industrial Board of Indiana. Proceedings for compensation under the Workmen's Compensation Act by William Cahill against the Home Packing and Ice Company and its insurer. From a ruling by the Industrial Board, denying the petition of the Home Packing and Ice Company to set aside an agreement for compensation and ordering a resumption of payments thereunder, the petitioner appeals. *Affirmed.*

Batt & Danner, for appellant.

A. J. Kelley and *F. S. Rawley*, for appellee.

DAUSMAN, J.—On April 1, 1917, the appellee received an injury by accident while at appellants' industrial plant. Thereafter appellants' insurance carrier made an investigation of the matter and reported to appellant that appellee was in the employment of appellant at the time of the accident; that appellee's injury arose in the course of the employment; and that his average weekly wage at said time was \$35. On November 5, 1917, the parties hereto entered into an agreement as to compensation under §57 of the Workmen's Compensation Act. Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918. This agreement was signed also by the insurance carrier, and was filed with and approved by the Industrial Board. Pursuant to the agreement, appellant paid the medical, hospital and surgical expenses occasioned by the injury, and also compensation aggregating \$435.60. On August 2, 1918, appellant filed its verified petition to set aside the agreement on the ground (1) that it was entered into by reason of mutual mistakes of fact, and (2) that it does not fully comply with the statute.

The specific facts, concerning which it is averred the parties acted mistakingly, are the following: (1) That appellee was in the employ of appellant when he received the injury, but in truth he was not; (2) that appellee's average weekly wage was \$35, but in truth was only \$21.10; and (3) that the injury, by accident, arose out of and in the course of the employment, but in truth did not.

The particular defect which appellant claims constitutes an incompleteness is that it provides compensation for the period of total disability only, and fails to make any provision for compensation for any period of partial disability which may ensue.

After hearing the evidence, the board found that there was no mistake, refused to set aside the agreement, and ordered appellant to resume payments thereunder.

We have considered the evidence carefully, and we find that it tends fairly to support the decision of the board with respect to the alleged mistakes.

The alleged incompleteness of the agreement, if it be a defect at all, is of such a character that appellant cannot complain of it. With some sem-

1. blance of reason appellee might complain of it on the ground that in the course of recovery his total disability may cease and a period of partial disability may follow, for which partial disability no compensation is provided. But the statute supplies a way by which any change in the condition of the workman may be presented to the board and the proper relief obtained.

Appellant asserts that the board has no power to order a resumption of payments, and that the sole power to enforce an award rests in the circuit

2. court. But the attempt to procure a decision on that point in this appeal is manifestly premature.

The sufficiency of the petition to raise the question whether the injury arose out of and in the course of the employment has not been presented. But

3. we deem it advisable to say that we doubt the propriety of permitting that question to be tried on a petition to set aside an agreement for compensation. Appellant earnestly insists that the injury did not arise out of the employment, but does not claim that there was any mistake as to any specific fact entering into this element. Apparently appellant and its insurance carrier were fully informed concerning every evidential fact, and from these facts they drew their own conclusion. Knowing all the details, they concluded that the injury arose out of and in the course of the employment. By making the agreement they admitted and confessed liability. See *Retmier v. Cruse* (1918), 67 Ind. App. 192, 119 N. E. 32. They recognized the agreement by continuing to make payments thereunder; but finally it occurred to them that perhaps they erred in their conclusion as to their liability. Evidently their petition was then filed in the hope that by this procedure they could have the board determine whether the injury arose out of and in the course of the employment, and thus procure a review of the very thing which they had determined for themselves. An agreement for compensation, made in compliance with the statute and approved by the board, has the force and effect of an award. *In re Stone* (1917), 66 Ind. App. 38, 117 N. E. 669. It would seem that an award resting on an agreement ought not to be set aside for

the mere purpose of permitting an employer to try out the merits of his confession of liability. It may be proper in a proceeding of this character to show that there was a mistake as to some specific fact which would result in modifying the award in some particular; but we are of the opinion that the question of liability cannot be raised in this manner. It is doubtful, also, whether the statute contemplates an appeal from the action of the board with respect to petitions of this kind.

The action of the Industrial Board is affirmed.

ADAMS v. SCHNEIDER ET AL.

[No. 9,956. Filed October 29, 1919.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*City Schools.—Powers of School Board.—School Athletics.*—The powers conferred on city school boards are broad enough to permit such boards to arrange for the conduct of field day exercises by their schools. p. 255.
2. OFFICERS.—*Discretionary Acts.—Immunity from Personal Liability.*—A duty is discretionary when it rests with the officer to determine whether he should perform a certain act, and if so, in what way; and, in the absence of corrupt motives, he is not liable for the exercise of such discretion. p. 255.
3. OFFICERS.—*Ministerial Acts.—Personal Liability for Negligence.*—The duties of an officer in the performance of an act which he has, in the exercise of a discretionary power, determined shall be done, are ministerial, and for negligence in the performance thereof, which results in injury, he may be liable. p. 255.
4. SCHOOLS AND SCHOOL DISTRICTS.—*Field Day Exercises.—Members of Board.—Discretionary Acts.—Personal Liability.*—The acts of members of the school board of a city, in determining to hold field day exercises, and the manner in which they shall be conducted, were discretionary, and for injuries resulting therefrom they were not personally liable. p. 258.

Adams v. Schneider—71 Ind. App. 249.

5. SCHOOLS AND SCHOOL DISTRICTS.—*Members of School Board of City.—Ministerial Acts.—Personal Liability.*—The acts of members of the school board of a city in preparing for field day exercises and in the general management thereof, were ministerial acts, for the negligent performance of which by themselves, by their agent, or by an independent contractor, they were personally liable. p. 258.
6. SCHOOLS AND SCHOOL DISTRICTS.—*Clerk of School Board.—Ministerial Acts.—Personal Liability.*—The acts performed by the clerk of a city school board in having seats constructed for use by spectators at field day exercises by direction of the school board were ministerial; and, if negligently performed, he was jointly liable with the members of the board for any resulting injury. p. 258.
7. NEGLIGENCE.—*Theaters and Shows.—Dangerous Structures.—Failure to Discover Conditions.*—One who owns or controls a place of public entertainment must know that the place is safe for public use, and use care and diligence to keep it safe; and want of knowledge of defective conditions discoverable in the use of ordinary care will not excuse him from liability for injuries occasioned by his neglect. p. 259.
8. NEGLIGENCE.—*Theaters and Shows.—Dangerous Structures.—Independent Contractor.*—One who owns or controls a place of public entertainment is not relieved from liability for injuries occasioned by the dangerous condition of the place by the fact that an independent contractor intervened in the preparation of such place for, or in the conduct of, an entertainment therein. p. 259.
9. NEGLIGENCE.—*Theaters and Shows.—Right of Patrons to Assume Safety of Place.*—Those who attend and pay for admission to a place of entertainment have a right to assume that a safe place has been prepared for them, and need not inspect the surroundings to determine whether they are safe. p. 259.

From Warrick Circuit Court; *Ralph Roberts*, Judge.

Action by Margaret Adams against Jacob U. Schneider and others. From a judgment for the defendants, the plaintiff appeals. *Reversed.*

John H. Luckett, Charles F. Werner, U. W. Youngblood and Eugene H. Iglehart, for appellant.

J. R. Brill, F. H. Hatfield and J. W. Brady, for appellee.

NICHOLS, P. J.—This action was in tort for damages resulting from personal injuries sustained by the appellant caused by the collapse of a tier of seats, one of which she occupied at appellees' invitation while patronizing a public exhibition for hire, given by appellees, and for admission to which the appellant had paid the charge required.

It is averred in the complaint in substance that: On May 22, 1914, the appellees gave, maintained and conducted for profit at the baseball park in the city of Evansville, a public exhibition and place of amusement and entertainment known as a "Field Day Exhibition." On and prior to said date the appellees invited the public to attend the same, and charged twenty-five cents admission with an additional charge for certain seats. Appellant accepted such invitation, purchased tickets, on the surrender whereof she was duly admitted and invited to occupy, and did occupy one of the tiers of temporary seats erected by appellees. While she was so seated, the seats gave way and fell to the ground, whereby the appellant was thrown violently to the ground amid a struggling mass of people, and severely injured. That at all times referred to, the management, maintenance, and supervision of said premises and seats, as between appellant and appellees, were in the exclusive power and control of the appellees. At the time of such injury and at the time the public were so invited to attend, said seats were not in a safe condition for such purpose, and were not strong enough to hold the people intended and suffered by appellees to

occupy them. Appellees negligently invited and permitted a large crowd of people, including appellant, to occupy such seats, as aforesaid, while the same were in such weak and unsafe condition. As a result of such negligence said seats gave way as aforesaid, and thereby appellant was injured to her damage in the sum of \$10,000 for which amount she prays judgment.

There was no demurrer to the complaint, but each appellee separately answered with a general denial. On change of venue, the case was tried in the Warrick Circuit Court. On trial, the appellant dismissed her action as to the defendant Tomlin. Appellant having introduced her evidence and rested, the appellees each moved the court to direct a verdict in his favor, each of which motions was by the court sustained, to which ruling the appellant excepted, and, the jury having returned a verdict according to such instructions for appellees, the court rendered judgment thereon that the appellant take nothing by her suit, and that the appellees should recover from the appellant their costs, to which judgment the appellant duly excepted. Thereafter the appellant filed her motion for a new trial, in which she specified as error: The court's ruling in sustaining the motion of each of the appellees to instruct the jury to return a verdict for such appellees and each of them; in so instructing the jury to return a verdict for each of the appellees; that the verdict is not sustained by sufficient evidence; that the verdict is contrary to law, and that the court erred in rendering judgment on the verdict of the jury against the appellant and in favor of each of the appellees. This motion was overruled by the court, to which ruling the appellant

excepted, and now on appeal assigns as error the ruling of the court in overruling her motion for a new trial. It appears by the evidence in this case that the appellees Rosencranz, Strouse and Schneider were members of the school board of the city of Evansville. The defendant Tomlin was superintendent of such schools, and the appellee Fisher was clerk of the school board. As such clerk it was part of his duty to make out payrolls, to attend to paying bills for the board, to look after the work generally and to transact minor matters of business for the board in which matters he had discretion. It had been the custom of the school authorities of the city of Evansville to conduct what is commonly known as "Field Day Exercises," such exercises having been conducted in substantially the same way for the past fourteen or fifteen years. In the year 1914, it having been determined to conduct such field day exercises as theretofore, the said appellees, members of the school board, directed the said appellee Fisher, clerk, to make arrangements therefor, a part of which consisted in constructing the seats, the falling of which resulted in the injury that is involved in this action. This authority to make arrangements for said field day exercises, and further to conduct the management of the ball park on field day, was given to appellee Fisher at a meeting of such school board. The said appellees, members of the school board, directed said Fisher to have the seats constructed, and thereupon he hired one Poelhuis to construct them, he having been the person who had done so for the two previous years. Poelhuis was instructed to put up the same kind of seats that he had built theretofore and was given no plans. He furnished the lum-

ber and took it away and owned it afterward. Appellee Fisher had nothing further to do with the construction of the seats, and did not see them until about two o'clock on the day of the accident, which was a short time before it occurred. He had then gone to the grounds for the purpose of getting everything in running order, being in charge of the management for the day, and with furnishing the facilities and getting everything to running smoothly. He was assisted in such duties by the janitors, teachers and policemen, whom he instructed in a general way to perform their duties as they had on previous occasions. Appellees Schneider, Strouse and Rosencranz had nothing to do with the entertainment further than hereinbefore set out, nor the selection of the person to build the seats, except to authorize appellee Fisher to have the work done as it had been done before. The said Poelhuis was furnished no plans or specifications and was left to his own independent judgment in all matters pertaining to the selection of materials, and the manner and plan of erecting said seats. There was no inspection of them until after the accident, when it was discovered that only six and eight-penny nails had been used, the seat boards only being nailed occasionally, "here and there." There was no sufficient bracing. Other than the appellant's injuries and the extent of the same, this is the substance of all the evidence given in this case, and at the conclusion of which, upon motion of each of the appellees, the jury was instructed to return a verdict against the appellant and in favor of each of the appellees. It will be observed that this action is not against the school board as such, or the city schools, but that it is an action against the respective

members of the school board and the clerk thereof individually.

It is made the duty of school trustees of cities to take charge of the educational affairs of their respective cities, and to provide a suitable apparatus and other articles and educational appliances necessary for thorough and efficient management of the schools (§6410 Burns 1914, Acts 1901 p. 514); to provide for the teaching of such branches as they may from time to time direct (§6582 Burns 1914, §4497 R. S. 1881); to care for and manage all property belonging to their corporation (§6412 Burns 1914, Acts 1907 p. 385); and to receive donations made to school corporations, the use of which is within the discretion of such trustees (§§6628-6632 Burns 1914, Acts 1901 p. 555). It is further made their right to equip playgrounds, and to control the same (§§6555o1, 6555q1 Burns 1914, Acts 1909 p. 197, §§1, 3). It need hardly be said that these powers of such boards are discretionary powers, and that in their scope they are broad enough to permit such school boards, in their discretion, to make all proper arrangements for the conduct of field day exercises, which, as a matter of common knowledge, go to the physical education of the pupil and his development in athletics. A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and if so in what particular way, and in the absence of corrupt motives, in the exercise of such discretion, he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in in-

jury, he may be liable in damages. *Bates v. Horner* (1893), 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824.

In each of the following cases, from which we do not need to quote, the powers held by the officer were held to be discretionary powers for which he was not liable: *Lynn v. Adams* (1850), 2 Ind. 143; *Morrison v. McFarland* (1875), 51 Ind. 206; *Butler v. Haines* (1881), 79 Ind. 575; *Houston v. Board, etc.* (1862), 18 Ind. 396; *State, ex rel. v. Gough* (1913), 55 Ind. App. 118, 103 N. E. 448; *Lamphier v. Karch* (1915), 59 Ind. App. 661, 109 N. E. 938; *Baker v. State* (1867), 27 Ind. 485; *Walker v. Hallock* (1869), 32 Ind. 239; *Spitznogle v. Ward* (1878), 64 Ind. 30; *McOsker v. Burrell* (1876), 55 Ind. 425.

In the last case cited a clear distinction was made between discretionary or judicial acts and ministerial acts, for the first of which there is no liability, but for the second of which there may be. In *Clark and Skiles on Agency*, the rule is well stated that: "Where an agent is guilty of misfeasance, that is, where he actually entered upon the performance of the duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, whether it be a wrong of omission or a wrong of commission, as where he fails or neglects to use reasonable care or diligence in the performance of his duties, he will be personally responsible to third person who is injured by reason of such misfeasance; the agent's liability in such case is not based upon the ground of agency but upon the ground that he is a wrong doer." Following this doctrine in the case of *Shepherd v. Lincoln* (1837), 17 Wend. (N. Y.) 249, it was held that for misfeasance it is enough to prove negligence or mismanagement. In that case the superintendent

in due course of his employment was repairing a bridge, and had caused some timbers to be removed which left the bridge improperly guarded, and the plaintiff, in attempting to drive across same in the nighttime, with his horse and wagon, fell through and was injured. It was held that the superintendent was liable, his act not being an act of nonfeasance in omitting to repair, for he had entered upon his work, but that the injury arose from his mismanagement. His obligation to avoid negligence was incident to the business he was prosecuting, whether in a public office or as a private person. It is not a case of nonfeasance but of misfeasance.

The case of *Tearney v. Smith* (1877), 86 Ill. 391, was an action for damage for the careless, improper and negligent manner in which the defendants, as commissioners of highways, had cut and dug a drain and graded an embankment so near the premises of the plaintiff, and so unskillfully, as to cause the rain and surface water running from the ditches and drains into and upon the lands of the plaintiff to his injury and the injury of certain walls, fences and ditches. It was held that the facts established the unskillful and careless manner in which the defendants discharged their duty; that the public had an undoubted right to have the highway constructed and the commissioners to construct the same, but that they had no right to use such rights in such way as to injure others, that their acts in constructing were ministerial acts for which they were personally responsible.

In *McCord v. High* (1868), 24 Iowa 336, it was held that the construction by a road supervisor of a crossing of a stream over which a highway passed is a

ministerial act, and must be so performed that the person through whose land the stream meanders will not be injured thereby, in the diversion or diminution of said stream. The supervisor, as such, was required by law to keep the highways in repair and, in the performance of this duty, he determined when and where repairs were necessary and what work should be done in order to effect the repairs. Such determination was regarded as of a judicial nature, for which he was not liable, but he was also required to direct the work of making the repairs that he had determined upon. This was simply a ministerial duty and negligence in its performance made him liable for damages.

In harmony with the foregoing authorities, we hold that the appellees, members of the school board, in determining that there should be field day

4. exercises in connection with their school were acting within their jurisdiction, and that such act, together with their action in determining
5. the manner in which such exercises should be conducted, was discretionary, and that for injuries resulting therefrom they were not liable;
6. but that the duties performed in making preparation for such field day exercises and the general management thereof were ministerial acts, for the negligent performance of which, if so performed, whether performed by themselves, by their agent, or by an independent contractor, they were liable for damages for injuries suffered by reason thereof. It follows that the duties performed by the appellee clerk of the board were ministerial acts, and for their negligent performance, if so performed, he was jointly liable with his coappellees.

It is a fundamental principle that one who owns or controls a place of public entertainment is charged with the affirmative, positive obligation to

7. know that such place is safe for public use, and he impliedly warrants such place to be safe for the purpose for which it is designed. He
8. is required to use care and diligence to keep the place safe for those in attendance and, failing to do so, he may be held liable for injuries
9. occasioned by his neglect. His want of knowledge of defective conditions which by the exer-

cise of reasonable care he might have discovered will not excuse him, nor will the fact that an independent contractor intervened in the preparation for or conduct of the entertainment. Those who accept the invitation to attend and who have paid the admission fee have a right to assume that a safe place has been prepared for them and it is not to be expected of them that they make an inspection of the surroundings for the purpose of determining whether or not they are safe. 38 Cyc 268; *Valentine Co. v. Sloan* (1913), 53 Ind. App. 69, 101 N. E. 102; *Higgins v. Franklin County Agrl. Soc.* (1905), 100 Me. 565, 62 Atl. 708, 3 L. R. A. (N. S.) 1132 (with case note). *Emery v. Minneapolis Industrial Exposition* (1894), 56 Minn. 460, 57 N. W. 1132; *Thornton v. Maine State Agrl. Soc.* (1902), 97 Me. 108, 53 Atl. 979, 94 Am. St. 488; *Currier v. Boston Music Hall* (1883), 135 Mass. 414; *Curtis v. Kiley* (1891), 153 Mass. 123, 26 N. E. 421; *Richmond, etc., R. Co. v. Moore's Admr.* (1897), 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Hawver v. Whalen* (1892), 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828.

Barner v. International, etc., Union—71 Ind. App. 280.

The facts in this case were such that the question of liability should have been submitted to the jury, and the court erred in directing the verdict. The judgment is reversed, with instruction to the trial court to grant a new trial.

BARNER v. INTERNATIONAL CIGAR MAKERS' UNION
OF AMERICA, LOCAL NO. 33, ET AL.

[No. 9,934. Filed October 29, 1919.]

1. BENEFICIAL ASSOCIATIONS.—*Death Benefits.—Dependency.*—In an action to recover death benefits under the by-laws of a union, by one claiming to have been dependent in whole or in part upon the deceased member, dependency is a question of fact and not of law. p. 262.
2. APPEAL.—*Findings.—Sole Fact in Issue.—Witnesses Before Judge.—Review.*—Where the trial judge saw and heard the witnesses, the Appellate Court will not overthrow a finding as to the sole fact in issue if there is any evidence to support it. p. 262.

From Marion Superior Court (103,769); *W. W. Thornton*, Judge.

Action by Anna Henrietta Barner against the International Cigar Makers' Union of America, Local No. 33, and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

E. E. McFerren, for appellant.

Joseph O. Carson, for appellees.

McMAHAN, J.—The appellant brought this action against the appellees to recover death benefits alleged to be due her as a dependent daughter of a

deceased member of appellee International Cigar Makers' Union.

Section 1447 of the by-laws of the appellee union provides that the member might designate in writing the person or persons to whom the death benefits should be paid, and, if no such designation is made, such benefits shall be paid to the widow of the deceased member; if there be no widow, then to the minor children of such deceased member, then to any relative of the deceased member who at the time of his death was dependent, in whole or in part, upon such deceased member.

On the trial of the cause all the facts alleged in the complaint were admitted to be true, except the allegation that the appellant was dependent in whole or in part upon her father for support. It appears from the evidence that appellant's father and mother were divorced when appellant was about three and one-half years of age, at which time appellant and two sisters were placed in a children's home at Cleveland, Ohio, where they remained about nine years. The mother, having then remarried, took all three children out of the home. Appellant thereafter continued to live with her mother about three years, during which time the mother boarded, clothed and schooled her. Appellant quit school and started to work in a cigar factory when about fourteen years of age, and worked continuously at such work until and after the death of her father in March, 1916. During this time she earned from \$5 to \$8 a week, having earned \$8 a week for six months or more before the father died. The father visited the children two or three times while they were in the children's home, at which time he would give them small

amounts of money with which to buy candy and playthings. The father never paid any part of appellant's board, nor furnished her with clothing, nor paid for her schooling. When appellant was about fifteen years of age she left her mother's home and lived with an older sister for about five years. After that she and an unmarried sister lived together and did light housekeeping for a period of about three years. The father during these years lived at Indianapolis, and during the summer time would frequently go to Cleveland on Sunday excursions, leaving Indianapolis in the morning and returning in the evening, at which time he would see some or all of his children. The father was a cigar maker by trade. He was out of employment part of the time, and when at work would earn about \$11 per week. From and after the first of November, 1915, he was sick and unable to work, and drew a sick benefit from the appellee union of \$3 per week. He had not visited nor seen appellant, nor given her any money or anything of value for six months or more prior to his death. There was some evidence to the effect that when he visited Cleveland on the Sunday excursions he gave her one or two dollars each time he saw her. Appellant was between twenty-two and twenty-three years of age at the time her father died.

The sole and only question for determination in this case is whether or not the appellant was dependent in whole or in part upon her deceased

1. father at the time of his death. Dependency is a question of fact and not of law. The trial judge saw and heard the witnesses, including
2. appellant and her oldest sister, and was thus in a better position to judge of the weight to

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be given to their testimony than we are. In such a case this court will not overthrow the finding of the trial court, if there is any evidence to support that finding. Our judgment is that there was sufficient evidence to sustain the finding of the trial court.

Judgment affirmed.

FORT WAYNE AND NORTHERN INDIANA TRACTION
COMPANY v. RIDENOUR.

[No. 9,884. Filed June 26, 1919. Rehearing denied October 31, 1919.]

1. **ASSAULT AND BATTERY.—Wilfulness.—Evidence.—Sufficiency.**—In an action for damages for assault and battery, the evidence is not insufficient to sustain a verdict for plaintiff because not showing that the assault and battery was wilfully committed, since there could not be an assault and battery without its being wilfully committed. p. 265.
2. **CARRIERS.—Carriage of Passengers.—Assault and Battery on Passenger.—Excessive Damages.**—In an action against a traction company by a physician to recover damages for an assault committed upon him by defendant's conductor, a verdict for \$500 was not excessive, even though plaintiff sustained no serious personal injuries, as he was entitled to recover for humiliation and wounded feelings, and the evidence showed there were other passengers on the car. p. 265.
3. **APPEAL.—Appellee's Failure to File Briefs.—Error Not Shown by Appellant.—Affirmance.**—Where appellant has not shown any *prima facie* error, the judgment will be affirmed, even though otherwise the cause would have been reversed for conduct of appellee in keeping the record from the files and his failure to file briefs. p. 266.

From Wabash Circuit Court; *John R. Browne*,
Special Judge.

Action by David C. Ridenour against the Fort

Fort Wayne, etc., Traction Co. v. Ridenour—71 Ind. App. 263.

Wayne and Northern Indiana Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Sayre & Hipkind and Barrett, Morris & Hoffman, for appellant.

Todd & Plummer and Loveland & Sollitt, for appellee.

MCMAHAN, J.—This is an action by appellee against appellant for damages on account of an assault and battery alleged to have been made by one of appellant's servants upon appellee while he was a passenger on one of appellant's cars.

The cause was tried by a jury and resulted in a verdict and judgment for appellee. The only question presented for our determination relates to the action of the court in overruling appellant's motion for a new trial.

Appellant contends that the verdict of the jury is not sustained by sufficient evidence, that the assessment of damages is excessive, and that the court erred in giving and refusing to give certain instructions.

The evidence shows without conflict that the appellee was a physician residing at Peru; that he, in company with his wife and daughter, boarded one of appellant's car in the city of Peru with the intention of getting off at another point in the city. A dispute arose between the conductor on the car and appellee relative to the car stopping at the point where appellee wished to alight. The conductor said he would not stop the car at that place. Appellee told the conductor that if he did not stop the car that

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he, the appellee, would, and with this statement appellee pulled the bell-cord to stop the car, whereupon the conductor struck the appellee with his fist, knocking appellee into the vestibule of the car. The conversation between appellee and the conductor was loud and sufficient to attract the attention of the other passengers on the car.

Appellant contends that the evidence does not show that the assault and battery was wilfully committed, and that therefore the verdict is not sustained

1. by sufficient evidence. There is no merit in this contention. We are unable to understand how there can be an assault and battery and it not be wilfully committed.

Appellant next contends that the damages assessed are excessive. The jury assessed appellee's damages at \$500. While the evidence does not show

2. that appellee was seriously injured in his person, he was also entitled to damages for humiliation and wounded feelings. The evidence as set out in appellant's brief does not show how many passengers were on the car at the time of the assault and battery, although it does disclose that there were others, some of whom testified as witnesses on the trial. The appellee was a doctor, residing and practicing his profession in the city of Peru, and the damages assessed are not such that we are justified in saying that they are excessive.

Appellant also complains of the giving and the refusal to give certain instructions to the jury, but neither the instructions given nor those refused appear to have been made a part of the record. Appellant has failed to show that the court overruled its motion for a new trial, that there was any exception

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taken to the overruling of such motion, or that any exception was reserved to the giving or refusing to give any of the instructions. Appellant has failed to present any reversible error.

The conduct of appellee in failing to file a brief in this cause, and in keeping the record from the files for a year or more, and in not returning it

3. until the court called for it, is such that we would not hesitate to reverse the case for failure of appellee to file a brief, if appellant had shown any *prima facie* error.

There being no *prima facie* error shown, the judgment is affirmed.

FORT WAYNE MERCANTILE ACCIDENT ASSOCIATION
v. SCOTT.

[No. 10,467. Filed June 25, 1919. Motion to reinstate denied October 31, 1919.]

1. *APPEAL.—Briefs.—Record.—Failure to Present Questions.—Dismissal.*—Where the errors assigned on appeal are the sustaining of the demurrer to a plea in abatement and the overruling of the motion for a new trial, and the brief fails to show that appellant reserved any exception to any ruling or action of the trial court, the complaint is not set out in the brief, no showing is made as to when the judgment was rendered or when the motion for a new trial was ruled on, if at all, neither the instructions nor the evidence is in the record, though error was predicated on the refusal of instructions and the sufficiency of the evidence challenged, and there is no condensed statement of the evidence in narrative form in appellant's brief, as required by Rule 22 of the Appellate Court, no question is presented for review on appeal and appellee's motion to dismiss will be sustained. p. 268.

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2. **APPEAL.**—*Motion to Reinstate Appeal.*—*Time for Filing.*—Where the time allowed by §704 Burns 1914, §662 R. S. 1881, for filing a petition for rehearing has expired and the opinion and a judgment of dismissal have been certified to the trial court, the appellate court has lost its jurisdiction and has no power to entertain a motion to reinstate the appeal. p. 269.
3. **APPEAL.**—*Petition for Rehearing.*—*Time for Filing.*—*Statute.*—A petition for rehearing must be filed within the sixty days fixed by §704 Burns 1914, §662 R. S. 1881, and the court has no power to extend the time so fixed. p. 269.

From Allen Superior Court; *Carl Yaple*, Judge.

Action by John E. Scott against the Fort Wayne Mercantile Accident Association. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

O. E. Fuelber, for appellant.

Leonard, Rose & Zollars and Shirts & Fertig, for appellee.

McMAHAN, J.—The appellee commenced this action to recover upon a certificate of membership in appellant association insuring him against accidents. Appellant filed a plea in abatement, to which a demurrer was sustained. The issues being closed by the filing of an answer and reply, the cause was tried by a jury, and resulted in a verdict and judgment for appellee.

Appellant filed a motion for a new trial for the reasons: (1) That the court erred in sustaining the demurrer to the plea in abatement; (2, 3, 4, 5 and 6) that the court erred in giving certain instructions; (7) that the court erred in refusing to give a certain instruction; (8) that the verdict of the jury is not sustained by sufficient evidence; (9) that the verdict of the jury is contrary to law; (10) that the verdict of the jury is contrary to the law and the evidence;

(11) that the amount of recovery is erroneous, being too large; and (12) that the court erred in admitting certain evidence.

The errors assigned are the sustaining of the demurrer to the plea in abatement and the overruling of the motion for a new trial.

The appellee, in April of this year, filed his motion, supported by brief, asking that the appeal be dismissed. The reasons set out in the motion are:

1. That appellant has failed to show that it reserved any exception to any ruling or action of the trial court; that the complaint is not set out in the brief; that no showing is made as to when the judgment was rendered or when the motion for a new trial was filed; that it does not appear that the motion for a new trial was ever ruled on; that the instructions are not in the record; that the evidence is not in the record; and that there is no condensed statement of the evidence in narrative form in appellant's brief, as required by Rule 22 of this court.

Although appellant was given notice in April of the filing of this motion to dismiss, it has taken no steps to correct or amend its brief, and has filed no brief in opposition to such motion.

Appellant's brief is subject to each and all of the objections pointed out by appellee. No exception appears to have been taken to the action of the trial court in sustaining the demurrer to the plea in abatement or to the overruling of the motion for a new trial; in fact, it does not appear that the court ever ruled on the motion. No exception appears to have been reserved to the giving or refusing to give any instructions, and an examination of the record

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shows that neither the instructions nor the bill of exceptions containing the evidence are in the record.

There being no question presented for our consideration, the appeal is dismissed.

ON MOTION TO REINSTATE APPEAL.

McMAHAN, J.—This appeal was dismissed June 25. On October 8, appellant filed its motion, asking the court to “reinstate said appeal for the reason that the same has been erroneously and improperly dismissed.”

Appellee insists that, the time for filing a petition for rehearing having expired, the opinion and judgment of dismissal having been certified to

2. the trial court, this court lost its jurisdiction, and has no power or authority to entertain a motion to reinstate it. This contention must
3. prevail. Section 704 Burns 1914, §662 R. S.

1881, provides that either party may file a petition for a rehearing within sixty days after the cause is reversed, affirmed or dismissed. A petition for a rehearing must be filed within the time fixed by statute. *Hutts v. Bowers* (1881), 77 Ind. 211. And the court has no power to extend the time for filing such petition. *Dudgeon v. Bronson* (1902), 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. 315.

As said by the Supreme Court in *Parker v. State ex rel.* (1893), 133 Ind. 178, 216, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567: “These parties have departed from the jurisdiction of the court, under the rules of the court as established in pursuance of the provisions of the statute, and we do not think that the issues litigated between them can have a rehearing in this court.” Motion to reinstate overruled.

Mulvaney v. Terre Haute, etc., Traction Co.—71 Ind. App. 270.

MULVANEY v. TERRE HAUTE, INDIANAPOLIS AND
EASTERN TRACTION COMPANY.

[No. 10,030. Filed October 31, 1919.]

1. **CARRIER.—Street Railways.—Actions.—Defenses.—Last Clear Chance.**—One who, knowing the east to be the proper side therefor, attempts to board the west side of a moving, northbound car arranged with railing to prevent boarding on that side, and at a place away from a regular stopping place, and knowing that there were double tracks there and northwardly whereon a southbound car might be met at any time, negligently and knowingly placed himself in danger, and for an injury received from a passing southbound car cannot recover unless its motorman had a last clear chance to protect him and failed to use such chance. p. 273.
2. **CARRIERS.—Boarding Street Car on Wrong Side.—Last Clear Chance.—Knowledge of Peril.**—In the absence of knowledge by the motorman of an approaching southbound street car, moving along the west rails of double tracks, of the peril of one attempting to board from the west side a street car moving to the north on the east rails of such double tracks, the doctrine of last clear chance does not apply. p. 274.
3. **TRIAL.—Instructions.—Directing Verdict.—Carriers.—Last Clear Chance.**—In an action for an injury to the plaintiff while negligently upon the running board of a moving street car on the side next to a contrary-bound street car approaching on the other of double tracks, a verdict for the defendant was properly directed by the court where the evidence failed to show that the motorman of the approaching car had any knowledge of the peril of plaintiff, or that he had any appreciable time within which he could have stopped his car before the injury, or that after knowledge of such peril he could have stopped his car before the injury, or that had he stopped his car the injury would have been avoided by the stopping of the car upon which plaintiff was riding. p. 274.

From Parke Circuit Court; *Henry Daniels*, Judge.

Action by Marion I. Mulvaney against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

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Daniel V. Miller, Jacob S. White and Harold A. Henderson, for appellant.

McNutt, Wallace, Sanders & Randel and Maxwell & McFadden, for appellee.

NICHOLS, P. J.—This was an action, tried in the Parke Circuit Court, by the appellant against the appellee to recover damages for personal injuries alleged to have been inflicted on appellant by the negligence of appellee in running and operating two of its cars in opposite directions, on parallel tracks, running north and south on North Sixth street, in the city of Terre Haute, Indiana. Appellant alleged that he was attempting to board the northbound car for the purpose of being carried as a passenger, and that, while standing on the running board on the west side of the car, looking for a seat in the car, appellee's motorman of the southbound car ran his car by and passed the one which appellant was attempting to board, knowing at the time that there was not sufficient space between the tracks and cars to allow them to pass without injuring the appellant, and knowing at the time that appellant was in a position of danger and peril from which he could not extricate himself in time to avoid injury; and that appellee, after it knew of the dangerous and perilous position of appellant and that he could not extricate himself therefrom, could by the exercise of ordinary care and diligence have avoided and prevented injuring appellant, but that appellee continued, with such notice and knowledge after said time, to run and operate said cars by and past each other, and thereby caught appellant between the cars and injured him.

After issues were formed, the cause was submitted

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to the jury for trial, and at the close of appellant's evidence the court, on motion of the appellee, gave a peremptory instruction to return a verdict for appellee, upon which verdict judgment was entered for appellee. After a motion for a new trial, which was overruled, appellant prosecutes this appeal. The only question presented for our consideration is the alleged error of the court in giving the peremptory instruction aforesaid.

It appears by the evidence that Wabash avenue, commonly called Main street, in Terre Haute, runs east and west, and that Cherry street is the first street north. Sixth street runs north and south, and is intersected by an alley half way between Main and Cherry streets. The distance between the north side of Main street and the south side of Cherry street is about 300 feet. Appellee maintained double tracks on Main and Sixth streets, in the center parts thereof. Prior to his going into the saloon business, in which he was engaged at the time of the accident, appellant had been a railroader three or four years in road and yard service for the "Big Four" Railroad Company. He had been in the habit of getting on and off moving cars. He was accustomed to riding on this line, and was acquainted with guard rails and summer cars. He knew that there were double tracks on Sixth street, that cars passed on this street, and that cars went north on the east track and south on the west track; he had been up and down on that street a great many times. He knew that the car was open on the east side, and knew that the east side, next to sidewalk, was the side for passengers to get on and off the cars. A few days before the accident, by ordinance, the place of stopping had been changed

from Sixth street back to Main street. Just before the accident, appellant came around the corner from Main street to the west side of Sixth street, ready to cross the street just as the rear end of a car came around from Main street to Sixth street. When the car did not stop, appellant ran, or walked fast, in a northeasterly direction, and jumped onto the running board on the west side of the car at the rear end, took hold of a grab handle, and then walked north on the running board, looking for a seat, when he saw another car coming from the north, to which he waved a bundle which he had in his hand; then, seeing that he could not get to the north end of the car, he tried to get under the guard rail or banister, which was down to keep people from getting off or on, on that side of the car, and while trying to do this he was struck by the southbound car and fell to the street a little south of the alley and about thirty-five or forty feet—one witness says seventy-five feet—from where he got on the car. The northbound car was running about twelve or fifteen miles an hour, and the southbound car was running eight or ten miles per hour. While the facts as given by different witnesses vary somewhat, the above are substantially correct, and sufficiently accurate for the purpose of this decision.

From the foregoing it appears that the appellant attempted to board a moving car not at a place at which it stopped to receive passengers, on the

1. wrong side, with the car's guard rail down, so as to prevent persons from boarding that side of the car, with full knowledge of the fact that the other side of the car was the proper side on which to board the car, with knowledge of the fact that there were double tracks on Sixth street, and that

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the car which he was attempting to board on the wrong side was liable to meet another car at any time. Under these circumstances, it is evident that he negligently put himself in a place of danger with knowledge that he was so doing, and he cannot recover in this case unless it appears that the appellee's motorman of the southbound car had a last clear chance to protect him, and failed to use such chance. *Asche v. Harmon* (1913), 54 Ind. App. 310, 101 N. E. 515; *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091.

Even if such motorman had seen the appellant at the time that he jumped upon the running board, there was no evidence as to the time or distance within which he could have stopped his car, but

2. there was certainly not an appreciable time within which he could have acted and stopped his car before the injury, for at most it was
3. but seventy-five feet from the place where the appellant jumped upon the running board of the northbound car to the place where he fell. These cars were approaching each other at a rate of not less than twenty-eight feet per second, and appellant must have been injured at the most within two seconds from the time that he jumped upon the running board of the northbound car. Within this time, to prevent injury, the southbound motorman, after seeing the appellant and comprehending his perilous position, must have set the brakes and overcome the momentum of his car before the appellant was caught between the two cars, which fact, of course, was before the cars had passed each other, and it appears by the evidence that the appellant did not fall to the ground until after the cars had passed each other.

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See *Chrystal v. Troy, etc., R. Co.* (1887), 105 N. Y. 164, 11 N. E. 380. This is leaving out of consideration the fact that the northbound motorman would not have stopped his car even if the southbound motorman had. It is not shown by the evidence that the motorman saw the appellant and, in the absence of knowledge of appellants' peril, the doctrine of last clear chance does not apply. *Terre Haute, etc., Traction Co. v. Stevenson* (1919), 189 Ind. 100, 123 N. E. 785, 126 N. E. 3, and the numerous cases there cited. It was essential in this case that the appellant should have shown that the appellee's motorman knew of the appellant's peril, and that he could have stopped his car in time to have prevented the injury after such knowledge, and that with such knowledge he failed to do so. The appellant having failed to make this proof, the court did not err in directing a verdict for the appellee.

The judgment is affirmed.

MASSACHUSETTS BONDING AND INSURANCE COMPANY v.
FREE.

[No. 10,036. Filed October 31, 1919.]

1. **INSURANCE.—Accident Insurance.—Actions on Policies.—Complaint.—Cause of Death.**—In an action on an accident policy, an averment in the complaint that insured, while at work, was poisoned by the accidental, involuntary and unconscious inhalation of sewer gas, which poisoned his system to such an extent that he died from the same, is sufficient to withstand demurrer on the ground that it did not show that death resulted solely

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- from the involuntary and unconscious inhalation of sewer gas. p. 277.
2. **PLEADING.—Accident Insurance.—Actions on Policies.—Complaint.—Averment Controlled and Aided by Provisions of Policy.**—In an action on an accident policy, an averment that death resulted from insured being poisoned by the accidental, involuntary and unconscious inhalation of sewer gas, which poisoned his system so that he died, was controlled and aided by a statement, in the policy that the company would pay if loss of life resulted solely from the involuntary and unconscious inhalation of gas or other poisonous vapor. p. 277.
 3. **INSURANCE.—Accident Insurance.—Actions on Policies.—Defenses.—Matters Provable Under General Denial.**—In an action on an accident policy, causes of and causes contributing to the death of insured, other than that pleaded, and the alleged fact that insured knowingly inhaled the sewer gas that caused his death, are provable under the general denial. p. 278.
 4. **PLEADING.—Matters Provable Under General Denial.—Special Answers.—Demurrer.**—Paragraphs of answer filed with a paragraph in general denial, and setting up only matters provable thereunder, are demurrable. p. 278.
 5. **APPEAL.—Evidence.—Review.**—Where there is evidence to support the material elements of the verdict, the Appellate Court will not weigh the evidence. p. 278.
 6. **TRIAL.—Directing Verdict.—Evidence on All Material Allegations.**—When there is evidence on each material allegation of the complaint, a motion to direct a verdict at the close of the evidence, made by defendant, should be overruled. p. 279.
 7. **TRIAL.—Directing Verdict.—Evidence.—Inferences.**—In considering a motion to direct a verdict the court must accept as true all the evidence and inferences against the one making the motion. p. 279.
 8. **TRIAL.—Directing Verdict.—Amount.—Insurance.—Actions on Policies.**—Where, in an action on a policy, there is evidence to sustain a recovery of an amount provided for by one clause of the policy, a motion to direct a verdict for a smaller sum provided for in certain contingencies by a different clause should be overruled. p. 280.
 9. **EVIDENCE.—Insurance.—Actions on Policies.—Declarations of Insured.**—A statement made by the insured to his wife, at their home, three miles from the place of the accident, and eight or ten hours thereafter, that he had to pull a sewer gas plug and got sewer gas, was not part of the *res gestae*, and was inadmissible in an action by the widow of the insured upon his accident policy for the loss of life by inhalation of sewer gas. p. 280.

10. *APPEAL.—Admission of Evidence.—Harmless Error.*—Where, in an action on an accident policy, a declaration by the insured as to the cause of his injury, was erroneously admitted in the testimony of plaintiff, his widow, the error is harmless where she later answered a similar question to the same effect without objection, and where other evidence was introduced without objection to the same effect. p. 280.

From Marion Superior Court (102,632); *V. G. Clifford*, Judge.

Action by Mary A. Free against the Massachusetts Bonding and Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

G. R. Estabrook, for appellant.

N. E. Carter and Pliny W. Bartholomew, for appellee.

NICHOLS, P. J.—This action, in the Marion Superior Court, was by the appellee against the appellant upon an insurance policy issued to Addison Free, and naming the appellee, who was the wife of the assured, as beneficiary.

It is averred in the complaint that the said Addison Free, while at work in Indianapolis, Marion county, Indiana, was poisoned by the accidental, involuntary and unconscious inhalation of sewer gas, which poisoned his system to such an extent that he died from the same on August 27, 1915.

The complaint is challenged by demurrer for the reason that it does not show that the death in question resulted solely from the involuntary and

1-2. unconscious inhalation of sewer gas. The policy, which is made a part of the complaint by exhibit, provides that: "If loss of life of the insured shall * * * result solely from * * * the in-

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voluntary and unconscious inhalation of gas or other poisonous vapor, the company will pay in lieu of all other indemnity, the original principal sum." The allegation of the complaint is sufficient to withstand the demurrer, but, if it were not, the statement in the policy controls and aids it, thereby rendering it sufficient. The demurrer was properly overruled. *Bayless v. Glenn* (1880), 72 Ind. 5; *Reynolds v. Louisville, etc., R. Co.* (1896), 143 Ind. 579, 40 N. E. 410; *Huber Mfg. Co. v. Wagner* (1906), 167 Ind. 98, 78 N. E. 329.

The appellant filed an answer to the complaint, in eight paragraphs, the first of which was a general denial. The appellee filed a demurrer for

3-4. want of facts to each of the second, third, fifth and sixth paragraphs of said answer, which was sustained to each of said paragraphs, and the appellant complains of this ruling of the court as error. The second, third and fifth paragraphs of said answer each aver another cause, or contributing cause, of the insured's death, and the sixth paragraph avers that the insured knowingly inhaled the sewer gas. Such facts, so far as material, were provable under the general denial, hence the demurrer to each of the paragraphs alleging them was properly sustained. *Lehman v. City of Goshen* (1912), 178 Ind. 54, 98 N. E. 1, 710.

Appellant contends that the evidence is not sufficient to sustain the verdict, that the verdict is contrary to law, and that the damages are ex-

5. cessive. The verdict of the jury finds every material fact averred in the complaint in favor of the plaintiff, and there is evidence to sustain such finding, including the amount of recovery. This court will not weigh the evidence. Appellant has given no

reason why the verdict is contrary to the principles of law as applied to facts found by the jury, and we see none.

Appellant's motion, at the close of the evidence, to direct a verdict was properly overruled. To have ruled otherwise would have been a clear invasion of the province of the jury, as there was evidence upon each material allegation of the complaint. A peremptory instruction should not be given, except where there is total failure of evidence and inference upon an essential matter, and the court must accept as true all the evidence and inferences against the one making the motion. *Matthews v. Myers* (1917), 64 Ind. App. 372, 115 N. E. 959. See, also, *Abendroth v. Fidelity, etc., Co.* (1919), — Ind. App. —, 124 N. E. 714. In this connection appellant challenges the application of the insured, which was read in evidence as a part of the policy without objection by the appellant, because of a discrepancy in its date and that of the policy, the application being dated June 1, 1914, while the policy is dated May 29, 1914. It is provided in the policy, however, that it is "issued in consideration of the policy fee of \$3.00 and of the application, a copy of which is endorsed hereon and made a part of this policy." and again, that "this policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance." These provisions, together with the fact that the application was read in evidence as a part of the policy without objection on the part of the appellant, leave this court without a doubt that the application read in evidence, which contained the name of appellee as beneficiary, was the application

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upon which the policy was issued, notwithstanding the discrepancy in the dates.

It is provided in the policy that "in the event of death * * * due partly to 'such injury,' and partly to disease or bodily infirmity or re-

8. sulting directly or indirectly from * * * voluntary exposure to unnecessary danger.

* * * the company's liability shall be one-fourth of the amount that would otherwise be payable under this policy." At the close of the evidence, and after the court had overruled the motion to direct a verdict for appellant, appellant filed a motion to instruct the jury to return a verdict for the appellant in the sum of \$125, being one-fourth of the amount of the policy, with interest from date of denial of liability. There was evidence that other diseases and infirmities with which the insured was afflicted were the result of the sewer gas poison rather than contributing concurrent causes. There was also evidence that the exposure to sewer gas poison was involuntary. The motion was properly overruled, for the same reasons as given for the above ruling on motion to direct a verdict for the appellant.

After a proper objection by appellant, which was overruled, appellee was permitted to state in answer to a question propounded to her that her hus-

9-10. band said to her that he had to pull a sewer gas plug and got sewer gas. This conversation was after the insured had gone home, a distance of about three miles from the place of the accident, and eight or ten hours thereafter. Such a statement was not a part of the *res gestae*, and it was error to admit it. *Pittsburgh, etc., R. Co. v. Wright* (1881), 80 Ind. 182; *Golibart v. Sullivan* (1903), 30 Ind. App.

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428, 66 N. E. 188; *Abendroth v. Fidelity, etc., Co., supra*. The error, however, is harmless, for the reason that the appellee later answered a similar question to the same effect without objection by appellant. Further, other evidence was introduced, without objection, to the effect that the insured's injuries were by sewer gas. The admission of improper evidence of a fact is harmless when the verdict is supported by other sufficient evidence. 1 Ind. Digest 705.

There is no reversible error, and the judgment is affirmed.

BROWN v. KEMP, ADMINISTRATRIX.

[No. 10,012. Filed November 4, 1919.]

1. **PARTIES.**—*Defect.*—*Remedy.*—*Waiver.*—*Action on Bond of Liquor Dealer.*—*Motion for New Trial.*—That an administratrix is not a proper party plaintiff in an action on a liquor dealer's bond, is ground for demurrer to the complaint, and if not so presented is waived and cannot be raised by motion for new trial. p. 283.
2. **INTOXICATING LIQUORS.**—*Retail Liquor Dealer's Bond.*—*Actions.*—*Torts.*—An action on the bond of a liquor dealer required by §8323g Burns 1914, §4, Acts 1911 p. 244, sounds in tort and is subject to the rule that there can be but one satisfaction for the damages, if any, sustained. p. 285.
3. **RELEASE.**—*Intoxicating Liquors.*—*Unlawful Sales.*—*Actions on Bond of Liquor Dealer.*—*Satisfaction by Joint Tort-feasor.*—After an administratrix, by authority of the probate court, has accepted satisfaction from and executed a release from liability to a railroad company for the killing of her decedent, she cannot proceed against a retail liquor dealer for unlawful sales causing intoxication resulting in such killing by a train, under the bond required by §8323g Burns 1914, §4, Acts 1911 p. 244. p. 289.

From Marion Superior Court (105,523); *Theophilus J. Moll*, Judge.

Action by Irene Kemp, Administratrix of the estate of Nathaniel Kemp, against Harry W. Brown and another. From a judgment for plaintiff against the named defendant, said defendant appeals. *Reversed.*

Russell Willson and *Romney Willson*, for appellant.

John Browder and *Joseph K. Brown*, for appellee.

McMAHAN, J.—The appellee, as administratrix of the estate of Nathaniel Kemp, commenced this action against appellant and the National Surety Company.

The complaint alleges that the appellant was a retailer of intoxicating liquors, and as such executed a bond as required by law (§8323g Burns 1914, Acts 1911 p. 244, §4) with said surety company as surety, a copy of said bond being filed with and made a part of the complaint; that appellant unlawfully sold intoxicating liquor to said decedent until he became intoxicated; that while he was in an intoxicated condition, and as a result of such unlawful sales, said decedent was run over and killed by a train of cars on the Lake Erie and Western Railroad; that the decedent left surviving him Irene Kemp, his wife, and a daughter, Lilly May Kemp, who were dependent upon him for support, and asking damages in behalf of the widow and child for their loss of support and maintenance. An answer was filed in two paragraphs, the first being a general denial. The second paragraph of answer alleged that the appellee as such administratrix commenced an action in the Marion Superior Court against the Lake Erie and

Western Railroad to recover damages from it on account of the alleged negligence of the railroad in running one of its trains of cars over said decedent and killing him; that appellee settled with the railroad company and was paid \$250 in full of all damages; that, in consideration of said payment, she executed and delivered to said railroad company a written release whereby she released and discharged the said railroad company from all claims and damages against it arising out of, and on account of, the death of said Nathaniel Kemp. A reply of general denial was filed and the cause was submitted to the court for trial. There was a finding against the appellant and said surety company in the sum of \$250. The appellant and the surety company each filed a motion for a new trial upon the grounds that the finding was not sustained by sufficient evidence, and was contrary to law. This motion was sustained as to the surety company and overruled as to the appellant, after which the cause was dismissed as to the surety company and judgment rendered against the appellant.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. The first contention of appellant is that an action

1. on a retail liquor dealer's bond for loss of support through death cannot be prosecuted by the administratrix; that this action should have been prosecuted by the state, on relation of the widow and child. The appellant relies upon *Couchman v. Prather* (1904), 162 Ind. 250, 70 N. E. 240, to support this contention. This case holds as appellant contends, but it is not controlling in this appeal. The right of an administrator to maintain this kind of an action was there raised by a demurrer for want of

facts. In the instant case the sufficiency of the complaint was not tested by demurrer. If appellant desired to raise the question as to the right of appellee, as administratrix, to prosecute this action, he should have presented that question by a demurrer for want of facts. The right of appellee to prosecute this action, not having been presented by demurrer, was waived, and cannot be raised by a motion for a new trial. §344 Burns 1914, Acts 1911 p. 415; *Gillispie v. Darroch* (1915), 57 Ind. App. 482, 107 N. E. 475; *American Maize Products Co. v. Widiger* (1917), 186 Ind. 227, 114 N. E. 457; *LaPlante v. State, ex rel.* (1899), 152 Ind. 80, 52 N. E. 452; *American Trust, etc., Bank v. McGettigan* (1899), 152 Ind. 582, 52 N. E. 793, 71 Am. St. 345; *Bowser, Admr., v. Mattler* (1894), 137 Ind. 649, 35 N. E. 701, 36 N. E. 714; *Frazer v. State* (1886), 106 Ind. 471, 7 N. E. 203; *White v. Suggs* (1914), 56 Ind. App. 572, 104 N. E. 55; *Standard Forgings Co. v. Holmstrom* (1915), 58 Ind. App. 306, 104 N. E. 872. Nothing is better settled than that, when the legislature specifically prescribes an adequate legal remedy, that alone is open to the litigant. *Southern Ind. R. Co. v. Railroad Comm., etc.* (1909), 172 Ind. 113, 87 N. E. 966; *Couchman v. Prather, supra.*

The evidence without any conflict shows that appellee commenced an action against the Lake Erie and Western Railroad Company to recover damages from it on account of its alleged negligence in running over and killing her decedent. Before the trial in the instant case, the appellee filed a petition in the probate court appointing her for leave to settle with the railroad company. Leave was granted, and the railroad company paid her \$250 in full of all claims against

it on account of the alleged negligent killing. Appellee thereupon signed, acknowledged and delivered to the railroad company a written release reading as follows:

“For the sole consideration of Two Hundred Fifty and no/100 Dollars, received to my full satisfaction of *The Lake Erie and Western Railroad Company* I hereby release and discharge the said Company from all liability for damages of every kind, nature or description, arising from injuries suffered or death sustained by *Nathaniel Kemp* deceased at or near Indianapolis, Indiana, on or about the seventh day of February, 1915; said settlement being authorized by order of the *Probate Court of Marion County*, in the State of Indiana; and I hereby agree that this release shall be a complete bar in any action which might be brought otherwise at common law or under any State or Federal statute for the benefit of any person or estate whatsoever, for the recovery of damages on account of said injuries or death.”

The appellant insists that the appellee, having received payment in full from the railroad company for the death of Nathaniel Kemp, and having exe-

2. cuted a release to it, is not entitled to proceed against the appellant; that the injury was single; and that there could be but one satisfaction.

The basis of an action on a liquor bond sounds in tort, and the tort-feasor rule applies in such actions. *American Surety Co. v. State, ex rel.* (1912), 50 Ind. App. 475, 98 N. E. 829. “The weight of authority will,” says Cooley, “support the more general prop-

osition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert action.” 1 Cooley, Torts (3d ed.) 247.

This court, in *City of Valparaiso v. Moffitt* (1895), 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. 522, said: “Primarily every person is liable for all the injury caused by him. If he acts separately he is separately liable for all the injury. If he acts jointly with others he is both jointly and severally liable for all the injury. These are the general rules, and to which there are exceptions. The rule is also well settled that an injured party can have but one satisfaction for the same injury. * * * He may have several judgments against different persons and in different amounts, but the payment of one operates as a satisfaction of all.” See, also, *Westfield Gas, etc., Co. v. Abernathy* (1893), 8 Ind. App. 73, 35 N. E. 399; *American Express Co. v. Patterson* (1881), 73 Ind. 430.

In *South Bend Mfg. Co. v. Liphart* (1894), 12 Ind. App. 185, 39 N. E. 908, the court said: “It would be impossible to apportion the damages between the two acts of negligence or determine the amount produced by each. The case is analogous to that of an injury produced by the collision of two railroad trains under different ownership and management, caused by the concurring negligence of both companies. Each company is jointly and severally liable for the whole injury.”

In *Smith v. Graves* (1915), 59 Ind. App. 55, 108 N. E. 168, the court said: “The action is in *tort* and appellee can have but one satisfaction for the dam-

ages, if any, sustained by him. The liability of the appellants as *tort feasons* is several and the suit may be maintained against all, or one, or any number of them. There is no right of contribution that can be enforced as between such defendants or persons liable for the same *tort*. A satisfaction of such claim for damages obtained from one or any number of such defendants or persons so liable for the same *tort* ends all liability therefor as against any and all persons against whom liability might have been enforced before such satisfaction was obtained."

The Supreme Court, in *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 87 N. E. 723, said: "Courts will not undertake to apportion the damage in such cases among the wrongdoers, and the injured party has the right to elect whether he will sue one or all."

In *Cleveland, etc., R. Co. v. Hilligoss* (1908), 171 Ind. 417, 86 N. E. 485, the court said: "It is an ancient and well-established rule, almost without exception in England and America, that for a single injury there can be but one recompense. When more persons than one unite in the commission of a wrong, each is responsible for the acts of all, and for the whole damage; also, where separate and independent acts of negligence * * * concur in causing a single injury, each is fully responsible for the trespass. Courts will not undertake to apportion the damage in such cases among the joint wrongdoers. The injured party has, at his selection, his remedy against all, or any number. * * * He may elect to look to one only, and, if he accepts from that one a benefit, or property, in satisfaction and release, he can go no further. He cannot have a second satisfaction. Hav-

ing had a reparation from one who was responsible for all the damage, and released him, all others who were jointly, or jointly and severally, liable are also released. One satisfaction is a bar to further proceedings on the same cause of action. * * * One who compromises a claim does not necessarily admit that the claim was well founded, but the one who receives the consideration is precluded from denying that it was. So it may be said that when a pretended claim for a tort has been settled by treaty, and satisfaction rendered the claimant by one so connected with the trespass as to be reasonably subject to an action and possible liability, as a joint tortfeasor, the satisfaction rendered will release all who may be liable, whether the one released was liable or not. In such a case it is not necessary that it should appear that the party making the settlement was in fact liable. It will be deemed sufficient if there is an appearance of liability."

The Supreme Court of New Jersey in *Matthews v. Delaware, etc., R. Co.* (1893), 56 N. J. Law 34, 27 Atl. 919, 22 L. R. A. 261, said: "When each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then, although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the tortfeasors are subject to a like liability."

In *Corey v. Havener* (1902), 182 Mass. 250, 65 N. E. 69, the defendants, each mounted on a motor tricycle with a gasoline engine making a loud noise, came up behind the driver of a wagon and passed him at a high rate of speed, one on each side, causing his horse

to shy and resulting in injury to such driver. A separate action was brought against each defendant. The court held that, both of the defendants having been found to be wrongdoers, it made no difference that there was no concert of action between them, nor was it possible to determine what part of the injury was caused by each. If each contributed to the injury, both were bound. The court says, if both defendants contributed to the accident, the jury could not single out one as the person to blame. There being two actions, the plaintiff was entitled to judgment against each for the whole amount. There is no injustice in this for a single satisfaction on one judgment is all the plaintiff is entitled to.

The rule is stated in 38 Cyc 488 as follows: "Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

The appellee having accepted satisfaction from the railroad company, and having released and discharged it from all further liability, cannot

3. now prosecute this action against appellant.

Judgment is reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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GRAY v. WISCAVER ET AL.

[No. 10,063. Filed November 4, 1919.]

APPEAL.—Evidence Conflicting.—Review.—Where the only questions presented under the rules of the Appellate Court require for determination a review of conflicting evidence, the judgment of the trial court is conclusive and will be affirmed.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action between Tillman D. Gray and George Wiscaver and another. From the judgment rendered, Tillman D. Gray appeals. *Affirmed.*

Edward P. Richardson and *Arthur H. Taylor*, for appellant.

Harry W. Carpenter, for appellee.

REMY, J.—The only questions which under the rules of this court are presented for our consideration require for their determination a review of conflicting evidence. Under such circumstances the judgment of the trial court is conclusive, and on the authority of *Gass v. Coggs* (1873), 44 Ind. 355, and *Nicholson v. Smith* (1916), 60 Ind. App. 385, 110 N. E. 1007, the judgment is affirmed.

BOARD OF FINANCE OF SCHOOL TOWN OF PORT FULTON
v. FIRST NATIONAL BANK OF JEFFERSONVILLE.

[No. 10,589. Filed November 5, 1919.]

1. **APPEAL.—Origin of Right.**—The right of appeal is purely statutory. p. 285.

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2. **OFFICERS.—Boards.—Appeals.**—In statutes authorizing appeals from administrative officers and administrative boards, the word "appeal" is used in a special and restricted sense. p. 295.
3. **OFFICERS.—Boards.—Appeal to Circuit Court.—Finality of Action.**—Where an appeal is authorized from an administrative officer or board to the circuit court, the action of that court is final unless an appeal therefrom is specifically authorized or unless the proceeding in that court is of such a character as to bring it within the general provision of the Code of Civil Procedure authorizing appeals from final judgments. p. 296.
4. **APPEAL.—Code of Civil Procedure.—Statutory Proceedings.**—The provisions of the Code of Civil Procedure concerning appeal do not apply to special statutory proceedings which do not involve the exercise of judicial power. p. 296.
5. **DEPOSITORIES.—Designation.—Approval of Bond.—Ministerial Acts.**—The approval of bond and designation of depository provided for by §13, Acts 1907 p. 391, §7534 Burns 1914, are ministerial acts and not judicial, whether performed by the board of finance or by the judge of the circuit court. p. 296.
6. **APPEAL.—Depositories.—Bond Approval.—Right of Appeal From Circuit Court.**—An appeal will not lie from the action of the circuit court upon a bond submitted under the provisions of the Depository Law, §13, Acts 1907 p. 391, §7534 Burns 1914, since there is no specific provision therefor in such law, and since the proceeding provided for is of such a character as to exclude the application of the appeal provisions of the Code of Civil Procedure. p. 296.

From Clark Circuit Court; *James W. Fortune*, Judge.

The bond of the First National Bank of Jeffersonville, tendered to the board of finance of the school town of Port Fulton to qualify such bank to become a depository of public funds, not having been approved, was presented, with a petition for its approval, to the judge of the Clark Circuit Court in vacation, and by him heard and approved, and said bank declared a depository. From the action of the judge, the board of finance appeals. *Dismissed.*

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George C. Kopp, W. B. Allison and L. A. Douglass, for appellant.

Henry A. Burt and James E. Taggart, for appellee.

This proceeding is governed by the act of the legislature concerning depositories of public funds. Acts 1907 p. 391; Acts 1909 pp. 182, 437; Acts 1911 p. 182; §7522 *et seq.* Burns 1914; Acts 1919 p. 698. It appears from the record that in January, 1919, there was no bank or trust company in the town of Port Fulton; that sometime in said month the following banking institutions of the city of Jeffersonville filed with appellant their several proposals to receive on deposit funds belonging to the school town of Port Fulton, viz., the appellee, First National Bank, the Citizens Trust Company, and the Clark County State Bank. The appellee tendered a bond executed by the Southern Surety Company; the Citizens Trust Company tendered a bond executed by a surety company, the name of which surety company does not appear in the record; and the Clark County State Bank tendered a personal bond. The appellant approved the bond of the Clark County State Bank, but failed to approve either of the other two.

The secretary of the board of finance gave the following testimony in explanation of the action of the board: "We knew the surety at the time and most of the signatures of the six who signed it; did not * * * know anything concerning the solvency of the sureties offered by the other two banks, or anything about the validity of the bonds tendered, or whether or not they were executed legally. We considered the Clark County State Bank the most convenient as a depository for our Board."

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The president of the board testified: "I knew the signatures of all the persons who executed the bond of the Clark County State Bank and knew their solvency. I did not know the solvency of the surety companies which executed the bonds tendered by the other two banks, or whether they were legally executed. The members of the Board preferred a personal bond to a surety company bond."

On February 4, 1919, being in vacation, the appellee filed its petition in the office of the clerk of the Clark Circuit Court. The petition is entitled "The First National Bank, etc. v. The Board of Finance, etc.," and is addressed "To the Honorable James W. Fortune, Judge of the Clark Circuit Court, in Vacation:"

The following is the substance of the petition: "The First National Bank of Jeffersonville, Indiana, hereby presents to you a bond executed by said Bank as principal, and the Southern Surety Company of Iowa as surety, in the sum of \$1000.00, in favor of said Board of Finance, dated Dec. 21, 1918, which bond was presented to said Board of Finance on the first Monday in January, 1919, and which bond said Board of Finance failed and refused to approve. This matter is presented to the end that you may proceed to hear and determine the sufficiency of said bond, and approve or disapprove said bond, as the facts warrant, and investigate the financial responsibility of said Bank and determine its fitness to be designated a depository of public funds; and on approval of said bond by said Judge, to declare said Bank a public depository."

The bond was filed at the time of filing the petition. Pursuant to the request indorsed on the petition, the

clerk issued a summons commanding "the defendant to be and appear" in said court on February 7, 1919, "to answer or demur herein." On February 11, 1919, the parties appeared by counsel and the defendant filed a demurrer to the petition on the ground "that plaintiff's complaint does not state facts sufficient to constitute a cause of action." In the memorandum filed with the demurrer six reasons are specified why "the complaint" is insufficient. The record, signed by the judge, recites that the "demurrer is by me overruled. * * * Thereupon, the defendant files its answer in denial to the petition." After hearing the evidence, the judge took the matter under advisement.

On the fourteenth day of the ensuing term, the following entry was made: "Come the parties by counsel, and the court, being sufficiently advised, now approves the bond in question and finds the plaintiff, the said First National Bank of Jeffersonville, Indiana, a proper institution to be entrusted with public funds and declares said bank a public depository. It is therefore ordered and adjudged by the court that said bond be, and the same is hereby approved; and that said bank be, and is hereby declared to be a proper institution to be entrusted with public funds, and is declared to be a public depository of public funds; and that said defendant deposit seventy-four per cent. of its funds in said bank, not exceeding, however, the sum of \$2000.00."

The board of finance filed a motion for a new trial, based on the sixth and eighth grounds specified in the Code of Civil Procedure as grounds for a new trial. The bank moved to strike from the files the motion for a new trial, on the theory that, because

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there is no provision for a new trial in the statute governing the proceeding, the granting of a new trial is not permissible. The motion to strike from the files was overruled. The motion for a new trial was overruled. Appeal granted.

The errors assigned are the overruling of the demurrer and the motion for a new trial.

Appellee has moved to dismiss the appeal on the ground that the legislature has not authorized an appeal from the action of the circuit court in a proceeding under said statute.

DAUSMAN, J. (After making the foregoing statement.)—In this jurisdiction the right of appeal is purely statutory. It is not unusual for the legislature of this state to authorize “appeals” from administrative boards to the courts; but in all such so-called appeals the word “appeal” is used in a special and restricted sense. *Hall v. Kincaid* (1917), 64 Ind. App. 103, 115 N. E. 361; *Board, etc. v. Heaston* (1896), 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. 192; *Board, etc. v. State, ex rel.* (1909), 173 Ind. 52, 88 N. E. 673, 89 N. E. 367.

Section 13 of said act, *supra*, reads as follows: “If any board of finance fails or refuses to approve the bond or securities of any such bank or trust company, the same may be presented to the circuit or superior court in the county, or the judge thereof in vacation, which, after three (3) days’ notice to the secretary of any such board of finance, shall proceed to hear and determine the sufficiency of such bond or security, and shall approve or disapprove the same as the facts warrant. Such court or the judge thereof in vacation shall also investigate the financial responsibility of

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any such bank or trust company and determine its fitness to be designated a depository of public funds. If such court or the judge thereof in vacation approves said bond or security, and finds said bank or trust company a proper institution to be entrusted with such funds, said bank or trust company shall be declared by such court or the judge thereof in vacation a public depository.”

It is well settled that there can be no “appeal” from an administrative officer or from an administrative board to a court unless specifically au-

3. thorized by the legislature. It is equally well settled that, where an “appeal” is authorized from an administrative officer or board to the circuit court, the action of the circuit court therein is final, and that there can be no appeal therein from the circuit court except in two instances, viz.: (1) Where an appeal from the circuit court is specifically authorized; and (2) where the proceeding in the circuit court is of such a character that it comes within the general provision of the Code of Civil Procedure which authorizes an appeal from all final judgments. *Indiana State Board, etc. v. Davis* (1918), 69 Ind. App. 109, 117 N. E. 883, 118 N. E. 978.

. In the statute governing this proceeding there is no provision for an appeal from the circuit court. It follows that appellee’s motion must be sustained unless said general provision of the Code is applicable.

It is well settled that the provisions of the Code of Civil Procedure do not apply to special statutory proceedings which do not involve the exercise of

4-6. judicial power. *Randolph v. City of Indianapolis* (1909), 172 Ind. 510, 88 N. E. 949; *City of Indianapolis v. Hawkins* (1913), 180 Ind. 382, 103

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N. E. 10. In the case at bar the board of finance could not, of course, have acted judicially; for judicial power can be exercised only by a court. Art. 7, §1, Constitution of Indiana, §161 Burns 1914; *Shoultz v. McPheeters* (1881), 79 Ind. 373; *Little v. State* (1883), 90 Ind. 338, 46 Am. Rep. 224; *Edwards v. Dykeman* (1884), 95 Ind. 509, 518; *State, ex rel. v. Noble* (1889), 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143. But judges do not always act in their judicial capacity. It seems that the legislature is permitted to call upon the judges to perform acts which are not judicial, but which are purely ministerial, executive, or administrative. We are of the opinion that in the case at bar the action of the judge of the circuit court, pursuant to §13 of the act concerning depositories, *supra*, did not involve the exercise of judicial power, and that the proceeding is of such a character as necessarily to exclude the procedure prescribed by the Code.

By §§11 and 12 of said act, it appears that the board of finance is given an important discretion in the matter of approving or disapproving any bond or securities offered by a bank seeking to become a depository. *Board, etc. v. State ex rel., supra*. By §13, *supra*, if the board of finance fails or refuses to approve the bond or securities, then the judge of the circuit court may be called upon to do two things, viz.: (1) To approve or disapprove the bond or securities; and (2) if he approves the bond or securities and finds the bank to be a proper institution to be entrusted with public funds, then he shall declare (designate or appoint) the bank a public depository. We are of the opinion that in approving the bond the judge acted in a purely ministerial capacity. *State,*

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ex rel. v. Lafayette County Court (1867), 41 Mo. 221; *Bosely v. Woodruff County Court* (1873), 28 Ark. 306; *Orchard v. Alexander* (1895), 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Stephens v. Crawford* (1846), 1 Ga. 574, 44 Am. Dec. 680; *In re Saline County, etc.* (1869), 45 Mo. 52, 100 Am. Dec. 337; *State v. McGonigle* (1890), 101 Mo. 353, 13 S. W. 758, 8 L. R. A. 735, 20 Am. St. 609. We are also of the opinion that in designating the bank a public depository the judge acted purely in a ministerial capacity. See *City of Terre Haute v. Evansville, etc., R. Co.* (1897), 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189. The utmost that can be said is that in the performance of either act the judge was merely substituting his discretion for the discretion of the board of finance. In other words, by §13, *supra*, the bank was given two opportunities to get its bond approved and itself designated a public depository.

But it may be said that there is a third element to be determined, viz., the bank's fitness to be designated a depository of public funds. It is true that by said §13 the judge of the circuit court is asked to transform himself into a sort of bank examiner for the purpose of investigating the financial responsibility of the bank; and he is directed also to determine the fitness of the bank as aforesaid. By what legal standard is that fitness to be determined? The act provides that no public funds shall be deposited in any bank or trust company (1) unless the institution is subject to visitation and examination by national or state bank examiners, and (2) until the institution has furnished a bond or securities, as therein specified, to the approval of the board of finance or the judge of the circuit court. But evidently the legisla-

ture intended that these two elements should not be exclusive, and that other elements might properly be considered. Otherwise, why direct an investigation of the financial responsibility of the bank? Otherwise, why should any one go to the trouble of determining the bank's fitness to be designated a depository of public funds? Moreover, §21, *supra*, specifically provides that where, as in this case, there is no bank or trust company within the school corporation, the board of finance may consider the element of convenience. Acts 1919 p. 698. We are unable to comprehend how the fitness of an institution to be designated a public depository can be judicially determined and established by a judgment where all the tests of fitness are not prescribed by law; and we are of the opinion that the legislature did not intend that such an absurdity should be attempted. The manifest legislative intent is that the judge shall satisfy himself as to the fitness of the bank before designating it a depository. Whether the bank is fit or unfit is purely a question of fact to be ascertained as a preliminary to final action. The ultimate action of the judge is the designation. The question of fitness is incidental.

The importance of the subject justifies us in stating more specifically the reasons for the conclusions we have reached.

If we were to regard the proceeding as a civil action within the meaning of the Code, to be tried on issues joined, and the result to be established by a formal judgment; or, if we were to regard it as a special statutory proceeding and then attempt to apply the Code, note the difficulties to be encountered.

It will be observed that the bank is not required

to file in the circuit court a transcript of the proceedings had before the board of finance. No complaint is necessary. By the express terms of the statute, all that is required of the bank is that the bond be presented. By implication, however, it requires that the judge should be informed that the board of finance had failed or refused to approve the bond. But the matter may be presented in the form of a simple petition. The statute does not contemplate that issues shall be joined by complaint and answers. It is apparent that the legislature intended that the proceeding should be informal and characterized by simplicity and directness.

No summons is to be issued. The statute provides that, after three days' notice to the secretary of the board of finance, the judge shall proceed to determine the sufficiency of the bond or securities. But what is the purpose of the notice? If the members of the board should fail to appear, would a default be authorized? If a default were entered, could it be taken as a confession that the bond or securities ought to be approved and the bank designated a public depository without an investigation? The language of the statute negatives that proposition. We are of the opinion that the purpose of the notice is analogous to that of the notice served on the clerk of the circuit court in a vacation appeal—to inform him of what is taking place in order that he may know its effect on his official duties. It is unreasonable to say that the legislature intended that there should be an adversary proceeding by the bank against the board of finance or any member thereof. It cannot be that the legislature intended that the board of finance, or any of its members, should assume an attitude of

hostility and make a defense, or, failing therein, suffer a default.

If, however, the proceeding be regarded as adversary, then what facts, logically and legitimately, ought to be shown to make out a defense? As against the bond, it would be germane to show that the surety company is financially weak or insolvent; that it is in bad repute for fair dealing; and any other element which a prudent and competent man would be likely to consider in determining whether it would be safe to accept the bond as indemnity against the loss of public funds. For indemnity, and indemnity without litigation or delay, is the thing desired. As against the bank, it would be germane to show that it is financially weak or insolvent; that it is not efficiently and conservatively managed; that its officers and employes are incompetent or discourteous; and any other element which a reasonable man would be likely to consider in determining its fitness to be designated a depository of public funds.

To make these defenses, thoroughly and in good faith, would require considerable time and the expenditure of considerable money. Is it permissible for a board of finance to spend public funds for that purpose? Is it to be said that the members of the board of finance must provide money from their private funds with which to make these defenses? If the financial condition of the bank or surety company is an issue to be tried, would it not be required to bring its assets into court in order that they may be scrutinized item by item? In every case, would not the burden be on the bank to prove its fitness to be designated a public depository? Could trial by jury be denied?

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At the close of the trial, assuming that the court found in favor of the bank, what judgment could be rendered? At the utmost, merely "that the bond be, and is hereby, approved; and that the bank be, and is hereby, designated a public depository." The court would have no authority to do more. But two things, then, would have been done by the court. It would have approved a bond and made an appointment. Either act is purely ministerial.

The foregoing considerations should suffice to indicate the folly of regarding the proceeding as a civil action within the Code. We are of the opinion that the legislature did not intend that there should be an adversary proceeding under the Code, requiring issues, trial, finding, and judgment, and did not intend that this function should be performed by the judge in his judicial capacity. What is presented to the judge is more in the nature of a business proposition than a civil action. However, in determining the matter the judge should exercise a sound discretion. The discretion must be exercised in a reasonable manner, and not maliciously, wantonly, or arbitrarily, to the wrong and injury of any one. This is held to be the rule applicable to all administrative officers when exercising the discretion conferred upon them by law in the performance of their official duties. *Taylor v. Robertson* (1898), 16 Utah 330, 52 Pac. 1.

Section 16 of said act provides: "That the commission of any depository may be revoked at any time, and an immediate accounting and settlement required by the board of finance under which it operates, for any cause deemed sufficient by such board of finance. Such depository, however, shall have the same right of appeal, and the circuit or superior court, or the

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judge thereof in vacation, the same jurisdiction to try and determine the case, as provided for appeals in section 13 thereof.”

Why, then, should the board of finance have the right of appeal to this court? When the judge of the circuit court approved the bond and designated the bank a depository, the board of finance was not thereby aggrieved, but relieved. Henceforth the board of finance may deposit funds belonging to the school town of Port Fulton in said bank, free from either legal or moral responsibility, excepting only as provided in said §16.

We realize that the words “jurisdiction to try and determine the case,” appearing in the section last quoted, when considered alone, tend strongly to support appellant’s theory that the legislature intended that the proceeding should be a civil action within the meaning of the Code. But when said words are considered in their relation to all other parts of the statute, it becomes apparent that the legislature could not have so intended. The legislature intended only that the judge should hear such evidence as would enable him to determine (1) whether he ought to approve the bond, and (2) whether he ought to designate the bank a public depository. There was nothing else involved, and consequently nothing else to “try” in the “case” before him. Without further elaboration of this point, we are constrained to say that the last sentence of said §13 is but an instance of the careless and unskilled use of language so often found in hasty legislation.

The appeal is dismissed.

McMahan, J., dissents.

RANSBURG v. UNITED STATES FIDELITY AND GUARANTY
COMPANY ET AL.

[No. 10,029. Filed November 6, 1919.]

1. **APPEAL.**—*Review.*—*Ruling on Demurrer.*—*Failure to Set Out Memorandum to Demurrer.*—The court on appeal cannot review the action of the trial court in overruling a demurrer to a plea in abatement where no memorandum to the demurrer is set out. p. 305.
2. **PRINCIPAL AND SURETY.**—*Action on Fidelity Bond.*—*Necessary Parties.*—*Defrauding Employer.*—*Jurisdiction.*—*Statute.*—Where a bonding company, maintaining an office and agency in the State of Indiana, executed a fidelity bond in the State of Ohio wherein it agreed to reimburse assured for any loss sustained by fraud or dishonesty of named employees in that state, and such employees embezzled funds of assured, the bonding company, a nonresident, could not, in view of §4798 Burns 1914, Acts 1901 p. 375, providing for service on such companies, defeat an action on the bond, brought in the State of Indiana, on the ground that, as the defrauding employees, principals in the bond, were primarily and essentially liable, and defendant bonding company had an office in Ohio, and as such employees had never been residents of Indiana, territorial jurisdiction was dependent on the residence of the principals immediately liable, so that the Indiana court, in the absence of such principals, who had been notified of the action by publication and failed to appear, would not have jurisdiction in a suit against the surety alone. p. 308.
3. **PLEADING.**—*Admissions.*—*Failure to Deny Allegations of Complaint.*—In an action against a foreign company on a fidelity bond, where the complaint alleged that defendant was maintaining an office and agency in the State of Indiana, it is admitted by failure to deny that defendant was authorized to transact business in the state, and that process might be served upon its authorized agent, as provided in §4798 Burns 1914, Acts 1901 p. 375. p. 309.
4. **INSURANCE.**—*Foreign Guaranty Company.*—*Actions Against.*—*Jurisdiction of Court.*—Where a foreign bonding company maintains an office and agency in the State of Indiana, it is, under §4798 Burns 1914, Acts 1901 p. 375, subject to process served in actions begun in Indiana, relating not only to business within the state, but also growing out of other matters as well. p. 309.
5. **REFORMATION OF INSTRUMENTS.**—*Fidelity Bond.*—*Action for*

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Reformation.—Necessary Parties.—In an action to reform a fidelity bond, employees who signed the bond as principals are necessary parties. p. 310.

6. *JUDGMENT.—Validity.—Reformation of Bond.—Service by Publication.*—Where two of plaintiff's employees, who signed a fidelity bond as principals, embezzled funds belonging to plaintiff, and he brought action on the bond against the surety company where-in he also sought reformation of the bond, where the employees were made parties and duly notified of the action by publication, such service will authorize a judgment against them reforming the instrument, though it will not support a personal judgment. p. 310.

From Marion Superior Court (100,527); *V. G. Clifford*, Judge.

Action by Harper J. Ransburg against the United States Fidelity and Guaranty Company, and others. From a judgment for the defendant named, the plaintiff appeals. *Reversed.*

Frank S. Roby, Charles Mendanhall and J. Burdette Little, for appellant.

Pickens, Moores, Davidson & Pickens, for appellees.

NICHOLS, P. J.—This was an action in the Marion Superior Court by the appellant against the appellee upon a guaranty insurance bond issued to

1. him by appellee, agreeing to reimburse him for any loss sustained by fraud or dishonesty of his employees, Moberly and Windle, both of whom were made defendants but not served by process unless by publication, and neither of whom appeared. There is a plea in abatement challenging territorial jurisdiction, to which demurrer was filed and overruled; but as no memorandum to the demurrer is set out, we cannot consider the court's ruling thereon. *Wainwright Trust Co. v. Dulin* (1916), 61 Ind. App.

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200, 111 N. E. 808; *Keeley v. Bradford* (1916), 62 Ind. App. 683, 113 N. E. 748.

The only other error presented is that the court erred in its conclusions of law.

It appears by the findings of fact that appellee was a corporation organized under the laws of the State of Maryland, and was on January 9, 1915, and continuously since has been, qualified to do business in the State of Ohio, and on said date had, and continuously since has been maintaining, an office and agency in the city of Toledo, Ohio, and also in the city of Indianapolis, Indiana, which offices were being maintained at the time of the commencement of this action. Moberly and Windle at said time were residents of the State of Ohio, and at the time of the commencement of this action were nonresidents of Indiana. On January 9, 1915, appellant was, and ever since has been, a resident of the city of Indianapolis, Indiana.

Appellant's action was based on the execution of a certain bond, which was made a part of the complaint, and which was executed by Moberly and Windle as principals, and appellant as surety on January 9, 1915, at the city of Toledo, Ohio, and was to cover certain liability of principals therein to appellant arising out of a certain agreement as of that date, which was executed in the city of Toledo, and which was made a part of the complaint. On October 28, 1915, appellant filed an affidavit that he did not know the present residence of said defendants Moberly and Windle, and thereby procured an order of publication of notice to be had to said defendants as nonresidents of the state, returnable January 3, 1916, and requiring said defendants to appear and answer on

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that date. Neither of them did appear on that date, nor thereafter, nor has any process been served upon them other than said publication. Summons was duly served on appellee, who entered its appearance by its attorneys and thereafter filed said plea in abatement. Appellant's claim is unliquidated, undetermined and disputed by defendants. No adjudication has ever been had as to appellant's claim, either in Ohio or Indiana, nor has any action been filed against defendants in any jurisdiction, other than this action.

The first paragraph of complaint charges, among other things, that defendants Moberly and Windle appropriated and converted to their own use and embezzled property and funds of the appellant, and asks damages against each of the defendants by reason thereof. The second paragraph charges the same thing, and in addition thereto charges the mistake of the scrivener who drew the bond, both in omissions and erroneous expressions, and prays, in addition to the judgment, that the bond be reformed as against each and all of the defendants to express the true and correct intention of the parties. The court states as its conclusions of law: "(1) That none of the defendants were residents of Marion county, Indiana, or of the State of Indiana at the time the action was commenced. (2) That the venue or territorial jurisdiction in this case is dependent upon the residence of the defendants immediately and primarily liable. (3) That the law on the issues in abatement is with the defendant. Judgment accordingly that the action abate against the plaintiffs, and for costs."

Appellant properly excepted to each conclusion of law and now, after motion for a new trial was overruled, prosecutes this appeal.

Appellee contends that the territorial jurisdiction in this case is dependent upon the residence of defendants immediately liable, and that as Mo-

2. berly and Windle were the principals on the bond and primarily and immediately liable to appellant, and as appellee had a branch office in Toledo, Ohio, the suit cannot be maintained in Indiana. Appellee contends that the Marion Superior Court, in the absence of the principals, has no jurisdiction in the suit against the surety or guarantor alone. It will be observed from the findings of fact that, while on January 9, 1915, defendants Moberly and Windle were residents of the city of Toledo, Ohio, at the time of the commencement of this action, the court only finds that they are nonresidents of the State of Indiana, and that appellant by his affidavit for publication stated that their residence was unknown to him. If we agree with appellee's contention, we must cast upon the appellant, before he can maintain his action against the appellee, the burden of locating the defendants Moberly and Windle so that he may bring this action in the jurisdiction in which he is able to find them. So far as appears by the record, they may have been, at the time of the commencement of the suit, residents of some foreign country, and one of them may have been in one jurisdiction and the other in another. It appears from the complaint that Moberly and Windle had appropriated and converted to their own use and embezzled property belonging to the appellant to the value of \$1,401.11. It is not uncommon that acts such as charged in the complaint are followed by the absconding of the parties guilty thereof, and that under such circumstances the guilty party purposely conceals his whereabouts. It ap-

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pears that the bond in suit must have been executed to meet just such exigencies, as it was to reimburse the appellant for any pecuniary loss sustained because of the fraud or dishonesty of Moberly and Windle. To say that under such circumstances the appellant must be compelled to sue the principals of the bond at such place as he may be able to locate them before he can have any right of action against the surety is practically to nullify the purpose of the bond. With this view of the law we cannot agree. It is provided by §4798 Burns 1914, Acts 1901 p. 375: "That every insurance company chartered, organized or incorporated in any other state or nation and now or hereafter doing business in the State of Indiana, shall be subject to the process of the courts of this state in any action, suit or other legal proceeding, relating to or founded upon, any claim or demand of any character whatsoever, held or asserted against said company by any citizen of the State of Indiana; and process against said company shall be served in the manner provided by existing laws."

It is a part of the findings of fact that appellee was maintaining an office and agency in the city of Indianapolis, and it is admitted, by failing to deny,

3. that it had been authorized to transact business in Indiana and that process could be served upon its authorized agent. *Rush v. Foos Mfg. Co.* (1898), 20 Ind. App. 515, 51 N. E. 143. Under the statute appellant is liable to be sued and served in the courts of Marion county, where it is maintaining an office and agency, and not merely in actions which relate to business done within the state, but in actions growing out of other matters as well. *Rush v. Foos Mfg. Co.*, *supra*; *Globe*,

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etc., *Ins. Co. v. Reid* (1898), 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291. In the case of *Hall v. Suitt* (1872), 39 Ind. 316, it was held that the indorser, as well as the maker, of a promissory note was immediately liable to the holder, and we can see no reason why this principle should not apply to the bond in suit. To the same effect see *Keiser v. Yandes* (1873), 45 Ind. 174.

By the second paragraph of complaint appellant seeks to reform the bond, and appellee contends that such action cannot be maintained without mak-

5. ing Moberly and Windle parties thereto. In this contention we hold that appellee is correct. *Durham v. Bischof* (1874), 47 Ind. 211;
6. *Keister v. Myers* (1888), 115 Ind. 312, 17 N. E.

161. In this action Moberly and Windle seem to have been made parties, and from the findings of fact we learn that an effort was made to bring them into court by publication of notice. So far as the record shows, however, there was no order-book entry made of such order of the publication, or of the proof of such notice; nor does it appear by the record that said Moberly and Windle were ever defaulted; if duly notified by publication, they should be defaulted and a proper record made thereof, in order that they may be bound by the proceedings to reform the instrument. This will authorize a judgment against such defaulted defendants, reforming the instrument, but will not authorize a personal judgment against them. We hold that the Marion County Superior Court had jurisdiction of the action.

The judgment is reversed, with instructions to the trial court to restate its conclusions of law in harmony with this opinion, and to enter judgment on the

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plea in abatement accordingly in favor of appellant, and for further proceedings not inconsistent with this opinion.

Opel v. WEISHEIT.

[No. 10,521. Filed November 6, 1919.]

1. WATER AND WATERCOURSES.—*What Constitutes.*—*Action for Obstruction.*—In an action for damages and to enjoin the further obstruction of a watercourse, evidence that twenty-eight years ago the alleged watercourse was a creek eighteen inches to three feet wide and too deep to cross with a team, and had a regular channel, and, while it had been straightened and the banks worn down until a team could cross in places, there were still banks four feet deep where the stream was two or three feet wide, constitutes some evidence of a watercourse. p. 313.
2. APPEAL.—*Review.*—*Evidence.*—*Conflict.*—A finding based on contradictory evidence will not be disturbed on appeal. p. 313.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Charles Weisheit against Mary Opel. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Bomar Traylor, for appellant.

C. H. Hartke, for appellee.

NICHOLS, P. J.—This was an action by appellee against appellant for damages for the obstruction of a watercourse, and for injunction. The complaint, in two paragraphs, was answered by a general denial. There was a trial by the court, which resulted in a finding and judgment for the appellee. After motion for a new trial, which was overruled, this appeal.

It is averred in the complaint, in substance, that the appellee is the owner of certain real estate in Dubois county, Indiana, and that the appellant is the owner of certain other real estate adjoining thereto. For many years, and time immemorial, there had been a well-defined natural course and stream of water in a well-defined channel running through the southern part of said appellee's real estate, from north to south, and crossing the dividing line between appellee's said land and appellant's said land. On or about May 10, 1916, appellant, without right, unlawfully built, and ever since has maintained, a solid plank fence about two and one-half feet high, together with a dam or embankment of logs, brush, soil and earth, and other material of the same height, on her land and on the dividing line between said tracts, and over and upon said watercourse, and in the channel thereof, thereby diverting it and throwing it back on appellant's lands, overflowing about ten acres thereof, thereby rendering it worthless for farming purposes. Appellee's private driveway, from his house to the public highway ran along said dividing line, and he had several years before constructed a bridge over the channel of said stream, which he kept in repair until the time of the obstruction aforesaid, and by reason of such obstruction the bridge was rendered worthless, and the roadway wet, soft, muddy and most of the time impassable and impossible to use by appellee. If such obstruction is allowed to remain, the usefulness of said roadway will be completely destroyed and his damages irreparable. There is a prayer for \$500 damages, and for the removal of said obstruction and an injunction against further continuing the same.

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The construction of the dam by appellant, and the fact of injury resulting therefrom, is not denied, but whether the waterway obstructed by the dam

1. constituted a watercourse is controverted, and the evidence as to the character of the waterway is very contradictory; but there is evidence that twenty-eight years before this suit the creek was eighteen inches to three feet wide, and too deep to cross with a team, and that the banks were gradually worked down till a team could cross. While the stream is mentioned as a ditch, the same witness also calls it a creek, and says it had a regular channel, and that there always was a channel there. The old ditch or creek, which was angling, had been straightened. On the Weisheit land it was two or three feet wide, with banks about four feet deep. This evidence constitutes some evidence of a watercourse, and this court will not weigh the evidence.

After hearing all the evidence, including the above, in effect, the court has found for the appellee, and rendered judgment for damages and enjoining

2. the appellant. We are not at liberty to disturb the court's decision. The legal principles involved, as to what constitutes a watercourse and as to weighing the evidence, are so well established that we do not need to cite authorities.

The judgment is affirmed.

OHIO OIL COMPANY v. BURCH ET AL.

[No. 9,962. Filed November 6, 1919.]

1. MINES AND MINERALS.—*Oil Leases.—Gas Well Clauses.—Free Use by Lessee.—Construction.*—Any construction of a lease that

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would permit the lessee to use gas from a well involved in excess of the amount required to operate the lease, free of charge, is to be avoided as inequitable and as not expressing the intention of the parties. p. 316.

2. MINES AND MINERALS.—*Oil Leases.—Gas Well Clauses.—Two Constructions Possible.—Rules of Construction.*—If an oil and gas lease is susceptible to two constructions the courts lean to that one which will effect a reasonable result upon the lease as a whole, adopting generally the construction against the lessee and favorable to the lessor, and resolving all doubts in favor of the latter, except where the parties have adopted a construction, when such construction will be applied. p. 316.
3. MINES AND MINERALS.—*Oil Leases.—Gas Well Clauses.—“Gas Only.”—What Constitutes Gas Well.—Evidence.*—In an action by lessor against lessee upon a lease for oil and gas for the money rental fixed for a gas well in addition to the free use by lessor of gas therefrom, “if gas only is found, in sufficient quantities to transport,” a finding that the well was a gas well only, was sustained by evidence that, when the well was drilled in, the escaping gas could be heard a mile away, that gas was furnished to lessor by lessee free of charge and was also transported and used to operate other leases by lessee through lines from which third parties used gas for domestic purposes, and that it was called a gas well by lessee’s pumper, although when first drilled in it produced three barrels of oil a day which had diminished to one-fourth of a barrel per day. p. 317.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Seth Burch and Laura Burch against the Ohio Oil Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

S. J. Gee and *Richardson & Taylor*, for appellant.
S. E. Dillon and *Frank Ely*, for appellee.

NICHOLS, P. J.—This was an action in the Pike Circuit Court by appellees against appellant to recover rentals based upon a certain lease which was made a part of the complaint, made by the parties therein named, and held by the appellant by assignment.

The complaint alleges in substance that appellant is indebted to appellees in the sum of \$150 per year for a well drilled upon appellee's premises producing gas in sufficient quantities to transport from said premises; that said well was known as No. 3 on said lease, and has produced gas, and gas only, in large quantities and in sufficient quantities to transport since January 25, 1911, and that ever since that time it has been transported by appellant off the premises. No rent whatever has been paid for such gas so transported, though frequent demands have been made by appellees. The complaint avers \$800 due, which is wholly unpaid. The provisions of the lease, as far as involved in this action, are substantially that the lessor shall have one-eighth of all the oil produced and saved from said premises. *If gas only is found in sufficient quantities to transport, the lessee agrees to pay the lessor \$150 annually for the product of each well so transported, and the first party to have gas free of cost for heating and lighting purposes in dwelling house.* The lessee shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, and also the right to remove any of its property at any time on payment of one dollar to the lessor and to surrender the lease for cancellation.

There was an answer in general denial to the complaint. The cause was submitted to the court for trial without the intervention of a jury, and there was a finding of the court for the appellees, and that there was due them \$875.

There was a motion for a new trial, which was overruled, after which this appeal. The only error assigned is that the court erred in overruling appel-

lant's motion for a new trial, and the errors in the motion for a new trial which are relied upon for reversal are: That the assessment of the amount of recovery is erroneous, being too large; that the damages assessed by the decision of the court are excessive; that the decision of the court is not sustained by sufficient evidence; and that the decision of the court is contrary to law.

Any construction of the lease that would permit the appellant to use gas from the well involved in excess of the amount required to operate the 1-2. lease, free of charge, is to be avoided as inequitable and as not expressing the intention of the parties. *Bryan, Petroleum* 146. *Huggins v. Daley* (1900), 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. And in view of the fact that such companies usually prepare their own forms of leases, with the assistance of skilled attorneys, while the lessor, without experience in such matters, acts without such legal advice, such leases are to be construed favorably to the lessor, with all doubts resolved in his favor. *Thornton, Oil and Gas* 249; *Steelsmith v. Gartlan* (1898), 45 W. Va. 27, 29 S. E. 978; 44 L. R. A. 107. In cases where the parties have put a construction on the lease, especially in cases of doubt, that construction will be applied to the instrument by the courts. *Diamond Plate Glass Co. v. Tennell* (1899), 22 Ind. App. 132, 138, 52 N. E. 168. *Thornton, Oil and Gas* 99. If the lease is susceptible of two constructions, the courts lean to that construction of the lease as a whole that will effect reasonable results (*Columbian Co. v. Blake* [1895], 13 Ind. App. 680, 686, 42 N. E. 234); and generally, with this rule in view, the construction is adopted that is most strongly

against the covenantor. *Indiana Nat. Gas, etc., Co. v. Hinton* (1902), 159 Ind. 398, 403, 64 N. E. 224. With these general principles before us, we shall undertake to determine the rights of the parties to this appeal.

The trial court, by its general finding, in construing the clause, "If gas only is found, in sufficient quantities to transport," as applied to the facts,

3. found that it means that an inconsiderable quantity of oil, though some is produced, will not prevent a construction that the well is a gas well only, if the quantity of gas is such as to justify transporting it; and the court further found that appellant, with full knowledge of the facts, including the quantity both of gas and oil that was being produced, determined that well No. 3 was a well producing gas only, within the terms of the lease, by furnishing to appellees gas free of cost for heating and lighting purposes, which was a part of the consideration for a well in which gas only should be found in quantities sufficient to be transported. With this construction of the lease by the court, together with its interpretation of appellant's construction thereof, we are in accord. The evidence as to the quantity of gas is in conflict, but there was evidence that when the well was drilled in, the escaping gas could be heard a mile away, and that, while it diminished in quantity, as late as the year 1916, escaping gas could be heard fifty feet away; that the gas was transported from the farm to a power plant on another lease, which power plant was used to operate wells on divers other leases, and that other parties used gas for domestic purposes from the power plant lines; that one of the pumpers had said that it was a gas well, and that

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they could not operate the power plant without it. When first drilled, the well produced about three barrels of oil, and in October, 1916, it was producing from a half to three-quarters of a barrel a day, and at the time of the trial it was producing not more than one-fourth of a barrel a day. This evidence further sustains the court's finding that the well was a gas well only, within the terms of the lease, and for which the appellant should pay the rental of \$150 per year; that the damages therefore were not excessive.

The judgment is affirmed.

LEEKA v. MUNCIE SAVINGS AND LOAN COMPANY ET AL.

[No. 10,052. Filed November 6, 1919.]

1. EQUITY.—*Principles.—Disregarding Form For Substance.*—Equity will disregard mere forms, and will not permit a substantial right to be defeated by the interposition of merely nominal or technical distinctions. p. 324.
2. HUSBAND AND WIFE.—*Entirety, Estate By.—Purchase-Money Mortgage During Coverture.—Divorce.—Suretyship.*—A divorced wife cannot successfully plead suretyship under §7855 Burns 1914, §5119 R. S. 1881, in an action on a bond and mortgage executed by herself and husband during coverture to obtain money to pay and used to pay a note given by the husband alone for money used to pay in part for the land involved, the title to which had been taken in the husband and wife, although the wife had contributed nothing to the payment of the price thereof. p. 325.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by the Muncie Savings and Loan Company against Irene Leeka and Curtis Leeka. From a judg-

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ment for plaintiff, the defendant Irene Leeka appeals. *Affirmed.*

Orr & Clark, for appellant.

Leffler, Ball & Needham and *Silverburg, Bracken & Gray*, for appellee.

NICHOLS, P. J.—This was an action in the Delaware Superior Court by appellee the Muncie Savings and Loan Company against appellant, Irene Leeka, and appellee Curtis Leeka.

The appellee loan company, by its complaint, seeks to recover a judgment upon a bond executed by appellant and appellee Leeka to appellee loan company, and for the foreclosure of a mortgage to secure said bond, the said mortgage being executed by appellant and appellee Leeka upon certain real estate owned by them as tenants by entireties. The complaint is in one paragraph. Appellant filed an answer in two paragraphs, the first being a general denial and the second tendering the issue of suretyship by her. She also filed a cross-complaint tendering the issue of suretyship and alleging the divorce of herself and appellee Leeka subsequent to the execution of the bond and mortgage, and asking that the interest of appellee Leeka in the mortgaged property be first exhausted before subjecting her interest to sale. Appellee Leeka, after demurrer was overruled, answered the cross-complaint by general denial. Appellee loan company filed its reply in three paragraphs to appellant's affirmative paragraph of answer, the first paragraph of the reply being a denial, the second, a plea of estoppel, and the third averring appellant's liability by virtue of an affidavit made by her that the consideration for the bond or note was to be used for

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the betterment of the joint estate of herself and her husband, said appellee Leeka.

Appellant filed her demurrer to appellee loan company's second paragraph of reply, also her demurrer to the third paragraph of appellee loan company's reply, her demurrer to the second paragraph of appellee loan company's answer to her cross-complaint, and her demurrer to the third paragraph of appellee loan company's answer to the cross-complaint, each of which demurrers was overruled, and each of these rulings is assigned as error. Appellant requested special findings of fact, which were duly rendered by the court with conclusions of law in favor of appellees, to which conclusions appellant duly excepted at the time, and has assigned as error each of the conclusions of law.

The questions presented on the demurrers aforesaid are presented by the court's special findings of fact and the conclusions of law thereon, which special findings, in substance, are as follows: On October 26, 1905, and for many years prior thereto, appellee Leeka and appellant were husband and wife, and so continued until they were divorced on December 7, 1914. On October 4, 1905, the real estate mentioned and described in the complaint was purchased, and on October 11, 1905, was conveyed by warranty deed to the said Leekas as tenants by entireties. The purchase price therefor was \$2,300, all of which was paid in full to the grantors on said October 11, 1905, and all of which was paid and furnished by appellee Leeka, and appellant paid no part thereof out of her own separate fund or property. On October 4, 1905, appellee Leeka borrowed \$1,000 from his brother, Christian Leeka, and gave and executed therefor his

note for said sum to his said brother, which note was signed by himself only. The money so obtained by said appellee Leeka from his brother was used in part payment of the purchase price for said real estate, and the same was borrowed from the brother by appellee Leeka for that purpose, which was for the joint benefit of both appellee Leeka and appellant. On October 26, 1905, appellee Leeka and appellant executed to appellee loan company their certain bond and obligation in the sum of \$1,000, which bond and obligation was signed and executed by said appellee Leeka and appellant and, to secure the payment of the same, appellee Leeka and appellant executed their certain mortgage on the real estate, which bond and mortgage are the basis of this action. Prior to the execution by appellee Leeka and appellant of said bond and mortgage, appellee loan company inquired of appellee Leeka the purpose for which the money to be obtained by means of said mortgage was to be used, and was informed by said appellee Leeka that said money was being borrowed, and would be used, for the purpose of paying part of the purchase price for the real estate so purchased as aforesaid. On October 26, 1905, and prior to the payment to them of the money by appellee loan company, appellee Leeka and appellant made under oath and delivered to appellee loan company their certain affidavit in relation to said loan in which, so far as concerns this litigation, it is stated that "the proceeds of said loan are to be used for the betterment of our joint estate and for no other purpose whatever." Appellee loan company made no inquiry of appellant, or any other person, regarding the purpose for which the money obtained by means of said bond and mortgage was

to be used, and appellant made no statements regarding the same other than the aforesaid statement contained in said affidavit. Appellee loan company had no information in reference thereto other than the statement of appellee Leeka and the statement contained in said affidavit. Appellee loan company believed the statement made to it by appellee Leeka regarding the purpose for which said money was to be used to be true, and relied upon said statement and said affidavit, and would not have made such loan had it believed or been informed that it was not to be used to pay part of the purchase price of said real estate. After the execution and delivery of said affidavit and of the bond and mortgage, appellee loan company delivered to appellee Leeka and appellant the said sum of \$1,000 in the form of a check payable to the order of both appellee Leeka and appellant. Said check was afterward indorsed by said appellee Leeka and said appellant, and on November 4, 1905, appellee Leeka, with the knowledge of appellant, delivered said check of \$1,000, so obtained from the appellee loan company, to his said brother in payment of the note of said appellee Leeka so executed by him to his said brother on October 4, 1905.

There was a default in payment upon said bond and mortgage, by reason of which this suit was brought, and at the date of judgment there was due \$824.76.

Upon these facts the court stated its conclusions of law as follows: (1) That the cross-complainant, Irene Leeka, and Curtis L. Leeka are principals upon said bond and mortgage. (2) That the plaintiff is entitled to judgment against the defendants herein upon the bond sued upon in the sum of \$824.76 and for

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costs and a decree for the foreclosure of said mortgage and the sale of the property described therein. (3) That the cross-defendant, Curtis L. Leeka, is entitled to a judgment against cross-complainant on her cross-complaint for costs herein.

We do not deem it necessary to discuss the questions involved by appellant's affidavit furnished for the purpose of inducing the loan which was the consideration for the bond and mortgage in suit, as these questions have been fully discussed and determined against appellant's contention in the case of *Ludlow v. Colt* (1908), 41 Ind. App. 138, 83 N. E. 643. Nor do we deem it necessary, under the foregoing facts, to write an extended opinion.

Appellant's able counsel have marshalled these facts from their viewpoint substantially as follows: Appellant's husband purchased the real estate upon which the mortgage is sought to be foreclosed, and the deed conveying the same was made to the husband and wife as tenants by entireties. A week before the deed was delivered, the husband borrowed from his brother \$1,000, giving his individual note therefor. There was no further contract or agreement between the husband and his brother in relation to the loan. Appellant did not sign the note evidencing the indebtedness. Appellant says it was a clear, clean, separate transaction between the husband and his brother with no claim whatever against the appellant for the payment of the loan. A week after the transaction, the husband paid the purchase price for the property to which title was taken by entireties, using the money borrowed from his brother, with other money, for that purpose. Two weeks later, appellant says the property was owned by herself and

her husband by entireties, free from any lien or incumbrance and with no liability upon her for the payment of the note executed by her husband to his brother. At that time the bond and mortgage were executed to appellee loan company, and the money obtained was used by the husband to pay his note to his brother.

On these facts appellant contends that she was only a surety upon the bond and mortgage executed to appellee loan company. As appellant says, the first and main question to be determined in considering the conclusions of law upon the findings of fact is whether or not the appellant was a surety upon the bond and mortgage sued on.

Appellant's statement of facts may be substantially correct, as far as it goes, but we cannot agree with her conclusion. From the findings of fact, as rendered by the court, it appears that appellee Leeka paid the purchase price for the real estate, and that appellant did not pay any part thereof; that the title was taken to husband and wife by entireties without any consideration whatever being paid by appellant. For the purpose of paying the purchase price which appellee Leeka paid, it was necessary for him to borrow \$1,000, which he did borrow from his brother, and which money so borrowed was used in the purchase of the real estate so conveyed to the husband and wife by entireties.

It has been repeatedly held that where a husband purchases land and executes his own note for the purchase price, which note remains unpaid,

1. and causes the land to be conveyed to his wife, who pays no consideration therefor, the vendor may establish a lien against the land, the wife being

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a mere volunteer. *Simmons v. Parker* (1916), 61 Ind. App. 403, 112 N. E. 31; and, further, that the technical relation of vendor and vendee is not necessary to the creation of a lien in favor of one party against the land of another (*Barrett v. Lewis* [1886], 106 Ind. 120, 5 N. E. 910); but it is not necessary that we determine in this case whether a lien was created in favor of appellee Leeka's brother, or whether such appellee Leeka was subrogated thereto, or whether the money borrowed of appellee loan company was for the purpose of discharging such lien, if any, against the real estate. We cite the authorities above for the purpose of illustrating the general principle that equity will disregard mere forms, and will not permit a substantial right to be defeated by the interposition of merely nominal or technical distinctions. *McCoy v. Barns* (1894), 136 Ind. 378, 36 N. E. 134. Long before Blackstone it was written, "Not the letter, but the spirit, for the letter killeth, but the spirit giveth life," and this principle has from time to time appeared in our equity jurisprudence, in various forms, one of which is as above written.

By her defense, and this appeal, appellant seeks to hold an interest in land in which she has nothing invested, at the expense of and against appel-

2. lee Leeka, who paid the purchase price, and against the rights of appellee loan company, who furnished a part of the money with which the purchase price was paid. In this the conscience of a court of equity will not permit it to assist her, unless driven by some inexorable rule of law. Section 7855 Burns 1914, §5119 R. S. 1881, relied upon by appellant, was intended to protect wives against surety debts, but not to enable them to acquire prop-

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erty at the expense of others. *McCoy v. Barns, supra.*

The rulings of the court upon the demurrers to the pleadings were not erroneous, and, even if they were so, they were rendered harmless by the court's correct conclusions of law.

The judgment is affirmed.

LIEBERMAN v. E. C. DEWITT AND COMPANY.

[No. 10,060. Filed November 6, 1919.]

APPEAL.—Briefs.—Insufficiency.—Review.—Where appellant's brief makes no showing that time was fixed for filing his bill of exceptions containing the evidence, nor that the bill was ever filed, and where his points and authorities are mere abstract propositions of law not referring to any error to which they should be applied nor to any page and line of the brief where errors may be found, and where substantial omissions are made in the statement of the evidence, such brief is not sufficient to require an examination of the evidence.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by E. C. DeWitt and Company against Morris D. Lieberman. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Harris & Ressler, for appellant.

Clarence Bretsch and *Pattee & Johnson*, for appellee.

NICHOLS, P. J.—Appellee sued appellant before a justice of the peace of Lake county, filing three paragraphs of complaint, the first of which was for goods, wares and merchandise sold and delivered to appellant, and the second was upon an account stated. The

third paragraph is not complete and does not need to be considered. After judgment in favor of the appellee in the court of the justice aforesaid, the cause was appealed to the Lake Superior Court sitting at Crown Point, Indiana, and was there tried upon the same issues as in the justice court. There was a judgment in favor of appellee, from which, after motion for a new trial was overruled, this appeal is prosecuted. The only error not waived which is properly assigned is that the court erred in overruling appellant's motion for a new trial. It does not appear by appellant's brief that any time was fixed within which appellant should file his bill of exceptions containing the evidence, nor does it appear that such bill of exceptions was ever filed. Under appellant's points and authorities there is no reference to the page and line of the brief on which errors committed may be found. The points and authorities contain only a series of abstract propositions of law without any reference to the error of the court to which they should be applied. This is not sufficient. *Cole Motor Car Co. v. Ludorff* (1916), 61 Ind. App. 119, 111 N. E. 447; *Warner v. Reed* (1916), 62 Ind. App. 544, 113 N. E. 386. What purports to be an abstract of the evidence appears in the brief, but it is evident from the brief itself that substantial omissions are made therefrom. The thirteenth and fourteenth reasons for a new trial as they appear in the motion make reference to certain written instruments which were admitted in evidence over the objection of the appellant. These instruments or an abstract thereof do not appear in appellant's statement of the evidence. Notwithstanding the irregularities in appellant's brief, we have examined his statement of the evidence

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as found therein, together with the two instruments which appellant has failed to set out, and we are fully satisfied that the evidence fully sustained the finding and judgment of the trial court, and that there was no error that justified an appeal.

The judgment is affirmed.

HAMMOND, WHITING AND EAST CHICAGO RAILWAY
COMPANY v. KASPER.

[No. 9,787. Filed May 28, 1919. Rehearing Denied November 7, 1919.]

1. *APPEAL.—Briefs.—Omissions.—Reply Brief.*—A reply brief filed more than sixty days after submission cannot perform the office of a supplemental brief nor supply omissions in the original brief. p. 329.
2. *APPEAL.—Instructions.—Presumptions.—Briefs.*—Where it does not appear from appellant's brief to the contrary, it will be presumed that the court withdrew or corrected any erroneous instructions therein shown to have been given, and that the court covered such instructions as are therein shown to have been refused and upon which appellant predicates error. p. 330.

From Lake Circuit Court; *W. C. McMahan*, Judge.

Action by Fred Kasper against the Hammond, Whiting and East Chicago Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Peter Crumpacker, F. C. Crumpacker and Edwin H. Friedrich, for appellant.

W. J. Whinery, for appellee.

NICHOLS, P. J.—This action was by the appellee against the appellant, in the Lake Circuit Court, to

recover damages for personal injuries alleged to have been sustained by appellee as a result of a collision between an automobile truck, which he was driving on a public street in the city of Hammond, Lake county, Indiana, and one of appellant's street cars running upon said street. The case was tried by a jury in said court, and resulted in a verdict for appellee in the sum of \$500. The only error assigned for reversal which is discussed is the overruling of appellant's motion for a new trial. Under this assignment, appellant complains of certain instructions given by the court on his own motion, and his refusal to give certain instructions tendered by the appellant.

It appears by appellant's brief, which we assume to be a correct statement of the record, which we do not search, that appellant tendered its written

1. instructions numbered 1 to 15, and requested the court to give the same to the jury, and that each and all of said instructions were refused, to which refusal as to each appellant excepted, and that the court of its own motion gave certain instructions to the jury, numbered 1 to 23, inclusive, to the giving of which the appellant at the time separately excepted. It does not appear by the appellant's brief whether other instructions were tendered, or whether other instructions were given. We are informed by appellee's brief that certain instructions were tendered by appellee, but whether they were given or refused appellee does not inform us. Appellant, after having its attention called to this omission, by the appellee, does not amend its original brief, but undertakes to make the correction in its reply brief. The reply brief was filed more than sixty days after the submission of the case and cannot, therefore, perform

the office of a supplemental brief, nor supply omissions in the original brief. *Albaugh Bros., etc., Co. v. Lynas* (1911), 47 Ind. App. 30, 93 N. E. 678; *Gates v. Baltimore, etc., R. Co.* (1900), 154 Ind. 338, 341, 56 N. E. 722.

It is the duty of this court to indulge all reasonable presumptions in favor of the trial court, and, it not appearing that the above-mentioned instruc-

2. tions were all of the instructions tendered or given, we must presume that there were others. So presuming, we must further presume that such instructions corrected any deficiencies or inaccuracies in the instructions given, or that the court thereby withdrew such erroneous instructions as could not be corrected; and that they covered such instructions as were refused, and upon which appellant predicates error. *State v. Winstandley* (1898), 151 Ind. 495, 51 N. E. 1054; *Board, etc. v. Gibson* (1902), 158 Ind. 471, 63 N. E. 982; *Frankel v. Michigan Mut. Life Ins. Co.* (1902), 158 Ind. 304, 72 N. E. 703; *Board, etc. v. Nichols* (1894), 139 Ind. 611, 619, 38 N. E. 526; *Lake Erie, etc., R. Co. v. Holland* (1904), 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; *Chicago, etc., R. Co. v. Wysor Land Co.* (1904), 163 Ind. 288, 69 N. E. 546; *Indianapolis Traction, etc., Co. v. Gillaspy* (1914), 56 Ind. App. 332, 105 N. E. 242; *Pence v. Waugh* (1893), 135 Ind. 143, 34 N. E. 860; *Barton v. State* (1900), 154 Ind. 670, 57 N. E. 515.

There is no available error. The judgment is affirmed.

McMahan, J., not participating.

SHANE BROTHERS AND WILSON COMPANY v. BARRETT.

[No. 9,999. Filed November 7, 1919.]

1. **TRIAL.**—*Direction of Verdict.*—*Sales.*—*Contract.*—*Action for Breach.*—*Failure to Establish Contract.*—In an action for the breach of an alleged contract of sale, where, under the evidence no contract of sale had been entered into between the parties, a verdict for the defendant was properly directed. p. 332.
2. **APPEAL.**—*Evidence.*—*Exclusion.*—*Harmless Error.*—*Contracts.*—Where a verdict was properly directed in an action for breach of contract, on the ground that the evidence showed that no such contract had been entered into, errors, if any, against the plaintiff, in excluding offered testimony, became harmless. p. 332.
3. **SALES.**—*Contract.*—*Correspondence.*—*Meeting of Minds.*—*Acceptance Deviating from Offer.*—No contract was formed by an order of goods to be delivered prior to June 1 "as ordered out by me," accepted "for scattered shipment February to May, inclusive," for want of meeting of the minds of the parties, since the order called for delivery when ordered out and in quantities ordered out by its maker prior to June 1, while the acceptance intended that a certain amount should be shipped out each month. p. 332.

From St. Joseph Superior Court; *George Ford*, Judge.

Action by Shane Brothers and Wilson Company against John C. Barrett. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Slick & Slick, for appellant.

Anderson, Parker, Crabill & Crumpacker, for appellee.

ENLOE, J.—This was an action by appellant wherein it sought to recover damages against appellee for the breach of an alleged contract for the purchase of certain flour and mill feed by the appellee from the appellant.

The complaint was in three paragraphs, to which the defendant answered, first, in general denial; and

in two paragraphs of counterclaim. Reply in general denial closed the issues, which were submitted to a jury for determination. At the conclusion of appellant's evidence, the court instructed the jury to return a verdict for the appellee, which was done, and judgment duly rendered thereon. To the action of the court in thus instructing the jury the appellant excepted. It then filed its motion for a new trial, which being overruled, it prosecutes this appeal. The error relied upon is the action of the court in overruling its motion for a new trial.

The first and second assigned causes for a new trial challenge the action of the court in giving to the jury the said peremptory instruction; the third and fourth reasons relate to the exclusion of evidence.

Upon the record as it comes to us, the first question for our determination is: Was there any such contract of sale entered into by and between the 1-3. parties as that herein sued upon and contended for by appellant? If there was no such contract, then the court did right in directing a verdict for appellee, and errors, if any, in excluding the offered testimony, become harmless.

The alleged contract sued upon consisted of the following correspondence, viz.:

“Telegram.

“9th RN. 75 Collect Blue. South Bend, Ind.,
3:35 P. M., Jan. 17th.

“F. A. Lonergan, Statler Hotel, Cleveland, O.

“I hereby confirm order given you Twenty-five Hundred Barrels King Midas Family Flour
Six Thirty Five Eights cotton quarters cotton

or Halves Cotton my option delivered here prior June first as ordered out by me also one Hundred Seventy-five Tons Feed with privilege of taking Bran at Twenty Two Standard Middlings Twenty Two Red Dog Flour Twenty Nine and Flour Middlings Twenty Six all prices delivered here same delivery feed as flour.

6:12 P. M.

J. C. Barrett."

To which the appellant, by letter, answered as follows, viz.:

"Shane Bros. & Wilson Co., Millers,
Minneapolis, Minn., January 22nd, 1919.

"Mr. J. C. Barrett, South Bend, Ind.

"Dear Sir:

"Confirming your order given our Mr. F. A. Lonergan, we have booked you 2,500 barrels of King Midas flour at \$6.35 bbl. in either halves, quarters or eights cotton. 175 tons of Mill Feed which is to be taken out in assortment to be furnished by you when cars are ordered forward at following prices:

"Clover Leaf Bran at \$22.00 per ton.

"Standard Middlings at \$22.00 per ton.

"Snow Ball Flr. Midds at \$26.00 per ton.

"Red Dog Flour at \$29.00 per ton.

"All in 100 lb. sacks; both flour and feed f. o. b. South Bend, for scattered shipment, February to May inclusive.

"All shipments will be routed to arrive at South Bend over the Michigan Central, and Arrival Draft terms applied. Our draft will be drawn payable thru the American Trust Co. of South Bend.

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"Thanking you for this order and assuring you that it will have our very best attention in every detail, we remain.

"Yours very truly,

"Shane Bros. & Wilson Co.

"PMM:ES

P. M. Marshall."

It will be noted that, in the telegram sent by the appellee ordering the flour, the language concerning delivery of same was, "*as ordered out by me,*" while in the letter, which it is contended by appellant was an acceptance of this order, the expression, relating to delivery was, "*for scattered shipment, February to May inclusive.*"

The expression, "as ordered out by me," is not a technical one; it is plain, simple English. The word "as," as used in the above expression, is a relative adverb and carries with it the ideas or elements of both time and quantity (Century Dictionary), so that the full force of the expression above used may be had, if written at length as follows, "When ordered out by me and in quantities ordered out by me prior to June 1st." Plainly, the appellee reserved to himself the right to give the order, both as to time of shipment, and as to quantity of shipment, the only restriction being the time limit—June 1.

The language of the alleged acceptance was "for scattered shipment, February to May inclusive." The expression "scattered shipment," does not seem to have any recognized legal meaning. A search of legal authorities and of dictionaries fails to disclose any such expression as being recognized as having a definite meaning. If it is a "trade term" used by shippers of the present day, its recognized meaning

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is not as yet generally known, and we find no evidence in the record that said expression has any definite meaning, and we therefore must give to it the meaning given to it by the writer, if such meaning is discoverable from the record.

In appellant's letter to appellee under date of February 16, 1916, it says: "Your contract with us is for scattered shipment, February to May, inclusive, and at least two cars each of the flour and feed should go out monthly, so please let us have directions for that part of your contract *that is due to go out in February.*" (Our italics.)

This clearly discloses that the minds of the parties never met. The alleged acceptance was not in and of the terms of the offer made by appellee, and there was no contract entered into between the parties. *Corydon Milling Co. v. Noblesville Milling Co.* (1919), 69 Ind. App. 491, 122 N. E. 362.

It follows that the court did not err in directing a verdict, and the judgment is therefore affirmed.

DAWSON, RECEIVER, v. JACKMAN.

[No. 10,032. Filed November 18, 1919.]

TRIAL.—Instructions.—Applicability to Evidence.—Tendered instructions are properly refused where there is no evidence to which they are applicable.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Action by Isaac Dawson, receiver, against Albert

S. Jackman. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James B. Marshall and *Frank E. Gilkison*, for appellant.

Hiram McCormick, for appellee.

REMY, J.—In August, 1914, Marshall and Byers entered into a partnership agreement, by the terms of which the latter leased of the former a certain farm for a period of five years; the teams, tools, and labor were to be furnished by Byers, and all live stock, except teams, was to be owned jointly by the parties, who were to share the profits equally. It was also agreed that, "if found desirable by the parties," they would operate in conjunction with the farm a "poultry and dairy business." The business did not prosper and, on application of Marshall, appellant was appointed receiver to take charge of the business. Shortly before the receiver was appointed, a cow and a heifer belonging to the partnership were sold by Byers to appellee without the knowledge or consent of Marshall. This action was commenced by the receiver to recover possession of said stock so sold.

The cause was tried by jury, resulting in a verdict for appellee. Overruling appellant's motion for a new trial is the only error assigned, and the only questions presented for our consideration arise on exceptions to the refusal of the court to give instructions numbered 1 and 2 tendered by appellant, and to the giving by the court on its own motion of certain instructions.

By said tendered instructions appellant sought to have the court instruct the jury that, if they should find from the evidence that the cow and heifer in con-

troversy were, under the agreement of partnership between said Marshall and Byers, a part of a herd of cows owned and kept by said partnership for dairy purposes, then and in that event neither of said parties would have any right to sell said property without the consent of the other party. If the law is as contended for by appellant, and as stated in said instructions, which we do not decide, still there was no error in refusing to give the said tendered instructions, for the reason that there was no evidence that a dairy business had been established by the partnership, or that the live stock in controversy was held for that purpose.

The instructions given by the court on its own motion, when taken as a whole, correctly state the law of the case.

Judgment affirmed.

MILLER v. MEADOWS.

[No. 10,060. Filed November 18, 1919.]

1. **APPEAL.—Complaint.—Sufficiency.—Attack by Assignment of Error.—Review.**—An assignment of error attacking for the first time the sufficiency of the complaint presents no question. p. 341.
2. **APPEAL.—Briefs.—Points and Authorities.**—An assignment of error not mentioned or discussed in that section of appellant's brief devoted to points and authorities, is waived. p. 341.
3. **TRIAL.—Conclusions of Law.—Exceptions.—Effect.**—An exception to a conclusion of law that the same is erroneous, concedes the full and correct finding of the facts. p. 341.
4. **TAXATION.—Tax Deed.—Regularity.—Burden of Proof.**—When a tax sale is relied upon to show title and the deed is not introduced in evidence, the burden is upon the holder to show the compliance with every step required by law to be taken, from the listing of the land for taxation to the delivery of the deed. p. 342.

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5. **TAXATION.**—*Tax Deed.*—*Title.*—*Prima Facie Evidence.*—*Lack of Required Signature.*—A tax deed not witnessed by the county treasurer is not *prima facie* evidence of title under §10380 Burns 1914, Acts 1891 p. 199, §206. p. 342.
6. **EQUITY.**—*Taxation.*—*School Fund Mortgage.*—*Auditor's Sales.*—*Action for Reconveyance.*—*Quiet Title.*—*Tender Before Suit.*—In an action for reconveyance of lands and to quiet the title thereto against the holder of deeds from the county auditor following sales to satisfy school fund loans and taxes, an offer by the plaintiff before suit to pay the full amount of taxes, penalty, interest and costs, and the full amount of principal, interest, penalties and costs paid out upon the school fund sale, was sufficient. p. 342.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by Sallie A. Meadows against Oscar G. Miller. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Robert C. Miller and *James W. Blair*, for appellant.
Thomas J. Sare, for appellee.

ENLOE, J.—This was an action by appellee against appellant, founded upon a complaint in two paragraphs. In the first paragraph she alleged that she was the owner of certain lands, and as such had theretofore borrowed money from the auditor of Monroe county and executed a school-fund mortgage thereon to secure payment of the same; that said auditor had, without warrant or authority of law, attempted to sell said lands so mortgaged to the appellant, and had executed a pretended deed of conveyance therefor; that said pretended deed was void, setting out specifically a number of reasons therefor; that she had tendered to the appellant the money paid by him for said land, and that he refused to receive the same, and that she had then paid said money to the auditor of

said county, in redemption from said pretended sale, and for the use and benefit of the appellant. She asked that a commissioner be appointed to reconvey said lands to herself, and for all proper relief. The second paragraph was an ordinary complaint to quiet title.

The appellant answered, first by general denial, and also by a second paragraph setting up said sale by said auditor to himself, also alleging the full payment of the purchase money therefor, and that he had purchased said lands at said sale to protect himself as the owner and holder of a tax title acquired by the purchase of said lands at a sale of lands for delinquent taxes, and for which lands, under said sale, he had received from the auditor of said county a tax deed, and that he had paid taxes thereon, etc. To this paragraph of answer appellee replied in general denial and also by an affirmative reply in one paragraph, to which paragraph of reply appellant unsuccessfully demurred. The appellant also filed a cross-complaint in three paragraphs, the first being the ordinary complaint to quiet title; the second alleging the sale of said lands for taxes, the purchase thereof by appellant, the receipt of a certificate of purchase therefor, the payment of subsequent taxes thereon, and the receipt and recording of a tax deed therefor from the auditor of Monroe county, and asking that his title thereto be quieted, or, in case said tax deed should be found to be illegal, that the sums of money paid by him, set out in said paragraph, should be decreed a lien upon said premises, etc. The third paragraph of cross-complaint alleged the former ownership of said lands by appellee, the execution of the mortgage to the auditor of Monroe county to se-

cure the payment of money borrowed from the common school funds, the failure of appellant thereafter to pay the taxes assessed against said lands so that the same became delinquent, the sale thereof by the county treasurer on account of such delinquency, the purchase of said lands at such sale by appellant, the failure of appellee to redeem from such sale and the issuing to him of a tax deed therefor. It also alleged the payment of subsequent taxes and costs, in connection with said sale and the failure of appellee to pay the interest on said school-fund loan; that thereupon the auditor advertised said lands for sale, and, no person bidding on said lands at such sale, the said auditor bid in said lands, on account of said school fund; that thereafter he caused said lands to be appraised, as provided by law, and sold the same to cross-complainant for the sum of \$200, that being the full amount of such appraisement, which sum was by appellant then paid to said auditor. The prayer asked that his title be quieted as against appellee, or, in case that it should be found that said sale of said lands by said auditor was invalid, that appellant be decreed a lien upon said lands for said amount, and for all proper relief.

To this cross-complaint the appellee answered in general denial. She also filed affirmative answers in one paragraph to each the second and third paragraphs of said cross-complaint, to which paragraphs of answer appellant replied in general denial, thus closing the issues.

The cause was submitted to the court for trial and, upon request duly made, the court found the facts specially and stated conclusions of law thereon, to which conclusions the appellant duly excepted. A de-

oree was thereupon entered, quieting appellee's title to said lands, and decreeing appellant to have a lien thereon for moneys expended.

Appellant then filed his motion for a new trial, which being overruled by the court, this appeal has been prosecuted.

The errors assigned and relied upon for a reversal are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) error in overruling demurrer to reply to second paragraph of appellant's answer; (3) error in conclusion of law No. 1; (4) error in conclusion of law No. 2; (5) error in conclusion of law No. 3; (6) error in overruling motion for new trial.

The first assigned error presents no question. *Riley v. First Trust Co., Admr.* (1917), 65 Ind. App.

577, 117 N. E. 675. The second assigned error

1-2. has been waived by appellant by his failure to mention or in any way discuss the same under "Points and Authorities" in his brief.

An exception to a conclusion of law that the same is erroneous proceeds upon the theory that the facts upon which same was based were full and cor-

3. rect (*Ray v. Baker* [1905], 165 Ind. 74, 74 N. E. 619); and we therefore proceed to examine the facts found to determine whether they are sufficient to support the conclusions of law stated by the court.

The court found (finding No. 3) that in February, 1915, the appellant received from the auditor of Monroe county, Indiana, a tax deed for the real estate in question, which deed had been duly recorded. The appellant insists that under this finding his tax deed is *prima facie* evidence of a good and valid title in

fee simple in him as the grantee thereof; that the presumption is that the taxing officers have done their duty, and that the assessment was valid, and the burden of proving the invalidity of his deed was on the appellee. It is true that the statute, §10380 Burns 1914, Acts 1891 p. 199, §206, makes such deed, *as is therein provided for*, *prima facie* evidence of the regularity of the sale and of all prior proceedings therein, but the trouble in the instant case is that the tax deed relied upon by appellant was not offered in evidence, was not made an exhibit to any pleading, and nowhere appears in the record in this case.

The stipulation in the record and the finding of the court concerning said deed fall far short of showing such a deed as is by statute made *prima facie* 4-5. evidence. There is no finding, nor is there any showing in the record, that said tax deed was witnessed by the county treasurer, and it was not, therefore, so far as disclosed by this record, *prima facie* evidence of title. *Green v. McGrew* (1905), 35 Ind. App. 104, 114, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. 149, and authorities cited. The burden was therefore upon appellant to show that every step required by law to be taken, from the listing of the land for taxation to the delivery of the deed, had been regularly complied with. *Mattox v. Stevens* (1895), 140 Ind. 282, 39 N. E. 460. This burden appellant did not attempt to discharge.

Appellant complains that the conclusions of law are erroneous because no legal and valid tender was made to him of moneys expended, etc., prior to 6. the bringing of this suit. This was not an action at law, but a suit in equity, and governed by the principles of equity. The trial court found

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that before the filing of this suit the appellee had offered to pay to appellant the full amount of taxes, penalty, interest, and costs, and the full amount of principal, interest, penalties, and costs that he had paid out upon said school fund sale. Under this finding the appellee had certainly offered "to do equity" in the premises, and such offer was sufficient to entitle her, as to this point, to maintain her action. The conclusions of law are well sustained by the findings of fact.

Appellant in his motion for a new trial assigns seven reasons therefor, but only the first, second, fifth and sixth are proper assignments, and the others will not therefore be noticed.

The first reason urged is that the findings are not supported by sufficient evidence, but the appellant has waived all objections, except as to the fifth, sixth, seventh and tenth of said special findings. We have read the entire record, and there is ample evidence therein to sustain each of said special findings, under the rule as to the burden of proof hereinbefore announced.

The court did not err in overruling the motion for a new trial.

The judgment is affirmed.

CENTLIVRE BEVERAGE COMPANY v. ROSS.

[No. 10,548. Filed November 19, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation.*—*Permanent Disability.*—*Evidence.*—The last paragraph of §31 of the Workmen's Compensation Act covers only injuries that cause some permanent partial disability that effects some diminution of earning

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power and, to sustain an award thereunder, there must be findings of such disability and diminution, and such findings must be supported by the evidence. p. 346.

2. **MASTER AND SERVANT.—Workmen's Compensation.—Industrial Board.—Findings.—Conclusiveness.**—The findings of the Industrial Board are conclusive upon the Appellate Court only when sustained by the evidence. p. 349.
3. **MASTER AND SERVANT.—Workmen's Compensation.—Loss of Testicle.—Functions and Earning Capacity Unimpaired.**—The loss of a testicle, unaccompanied by any impairment of any physical function, or by any disability to work, is not a permanent partial disability under the last paragraph of §31 of the Workmen's Compensation Act. p. 350.

From the Industrial Board of Indiana. Proceedings for compensation under the Workmen's Compensation Act by Sam J. Ross against the Centlivre Beverage Company. From an award for applicant, the defendant appeals. *Reversed.*

J. W. Hutchinson, for appellant.

McMAHAN, J.—The appellee filed his application with the Industrial Board, October 14, 1918, for the adjustment of his claim for compensation against the appellant under the Workmen's Compensation Act. Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918.

On review by the full board, a majority of its members found that: On and prior to February 1, 1917, appellee was employed by the appellant at an average weekly wage of \$18.09; near quitting time on said date he received a personal injury by an accident arising out of and in the course of his said employment, of which the appellant had actual knowledge at the time; that at the time of his injury appellee was engaged in piling kegs upon an icy floor, when he slipped and strained himself; he finished his day's work, went home, and the injury caused him to go to bed; an orchitis developed from the injury involving the left

testicle; on Friday morning, February 2, 1917, the appellant was notified of the appellee's illness, but no doctor was called; on the following Monday morning the appellee returned to his work, but was unable to make a full hand; at said time he notified his foreman, and a physician was called by appellant on said date; following said date the appellee, as a result of his injury, was disabled for work intermittently until May 6, 1918, when it became necessary to enucleate the left testicle on account of the conditions resulting from the injury, and that said injury has produced such permanent partial impairment as entitles the plaintiff to 100 weeks' compensation.

In accordance with the above finding, appellee was awarded compensation for 100 weeks at the rate of \$9.95 per week, beginning May 6, 1918.

The only error assigned is that the award is contrary to law. This award must be sustained, if at all, under §31 of the Workmen's Compensation Act, *supra*. Clauses (a) to (i) in this section provide arbitrarily that for certain injuries there shall be awarded compensation for a certain period definitely fixed. The last paragraph of the section provides for cases of permanent partial disability, other than those mentioned in clauses (a) to (i), the language being: "In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunities of the injured employe, compensation in lieu of all other compensation shall be paid when and in the amount determined by the Industrial Board, not to exceed fifty-five per cent. of the average weekly wages per week for a period of two hundred weeks."

As said by this court in *In re Denton* (1917), 65 Ind.

App. 426, 117 N. E. 520, 523: "This section deals with such injuries not from the standpoint of any total disability that may result temporarily or any disability that may continue through the period fixed by the section, but from the standpoint of the consequent permanent disability, and resulting diminution in earning power extending through life. The specific portions of the section assume that from the respective scheduled injuries a handicap of a certain gravity will result, for which compensation is arbitrarily fixed, regardless of the actual disability and loss of capacity. Where a workman suffers an injury covered by §31, he is entitled to the compensation fixed by that section, not because of the actual extent of the resulting disability, but because the section so declares."

The injury which appellee suffered is not one of the specific injuries provided for in subdivisions (a) to (i) of §31, *supra*. The last paragraph of said

1. section, heretofore quoted, dealing as it does with injuries coming within its terms from the standpoint of permanent disability and resulting diminution of earning power, and the legislature not having specifically provided for said injury, the fact of disability and the resulting diminution of earning power must be found as a matter of fact, and that finding must be sustained by the evidence in order to sustain an award.

The appellant insists that there is no evidence that the injury in question resulted in any permanent disability to work, or for work, or in any impairment of the future usefulness of appellee. The cases covered by §31, *supra*, are expressly stated to be cases of "permanent partial disability, including any disfig-

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urement which may impair the future usefulness of the injured employee."

We must keep in mind the fact that the act does not give compensation for loss of a member, such as the loss of a limb, but for the loss of earning capacity actually caused by the loss of the limb. "The loss of his capacity to earn, * * * is the basis upon which his compensation should be based." *Gillen's Case v. Ocean, etc., Corp.* (1913), 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A 371: "The theory of the New York law is not indemnity for loss of a member or physical impairment as such, but compensation for disability to work * * *." *Matter of Marhoffer v. Marhoffer* (1917), 220 N. Y. 543, 116 N. E. 379. "Compensation is not allowed for pain and discomfort following an injury, but wholly for disability to labor." *Kid v. New York, etc., Co.*, 1 Cal. I. A. C. Dec. 475.

The Supreme Court of Nebraska, in *Epsten v. Hancock-Epsten Co.* (1917), 101 Neb. 442, 163 N. W. 767, in speaking of the Nebraska Workmen's Compensation Act, said: "The statute conclusively presumes that for the loss of, or the permanent loss of the use of, a hand, arm, foot, leg, or eye, the proper compensation is 50 per cent. of the wages for a specified number of weeks, respectively. For any other partial disability, compensation is to be determined by *proof of impairment of earning power*. (Our italics.) If an employe after the injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired."

The Supreme Court of Massachusetts in speaking of the general purpose of the Workmen's Compensa-

tion Act in *Duart v. Simmons*, (1918), 231 Mass. 313, 121 N. E. 10, said: "The general purpose of the act was to substitute, in cases to which it is applicable, for common-law or statutory rights of action and grounds of liability, a system of money payments based upon the loss of wages by way of relief for workers receiving injury in the course of and arising out of their employment. * * * All payments are by way of financial relief for inability to earn wages, or for deprivation of support flowing from wages theretofore received. The word 'compensation' in the connection in which it is used in the act, means the money relief afforded according to the scale established and for the persons designated by the act, and not the compensatory damages recoverable in an action at law for a wrong done or contract broken."

The Supreme Court of Rhode Island in *Weber v. American Silk Spinning Co.* (1915), 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E 153, in construing the Workmen's Compensation Act of that state said: It "is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in the section, although even permanent physical injury may have been suffered, and the burden is upon a petitioner to show this loss and, with reasonable definiteness, its amount. * * *; and, if it be suggested that the offer of the respondent to re-employ him at the former rate of wages did not necessarily imply permanency of employment, the fact still remains that the petitioner has presented no evidence showing loss of earning capacity or which would enable a court to make

an award of compensation for partial incapacity * * *.”

That compensation must be based upon a diminution of earning power was clearly recognized by this court in the Denton case, *supra*, wherein it was held that §31, *supra*, dealt with injuries from the “stand-point of the consequent *permanent disability and resulting diminution in earning power* extending through life. (Our italics.)

The Industrial Board's findings of fact are conclusive on this court only when sustained by the evidence. It therefore becomes our duty to determine whether there is any evidence to support the finding that the injury to appellee “produced such permanent partial impairment” as entitled him to the compensation awarded.

The evidence shows without any conflict that the appellee worked for appellant three or four years, during which time he washed and piled up beer kegs. About 4 p. m. on Thursday, February 1, 1917, while engaged in said work, he slipped and strained himself. He continued trying to work until quitting time, an hour later, when he went home and went to bed. He did not work any more until the following Monday, when he went back to work, and worked continuously thereafter until about May 1, 1918. His weekly wage at the time of his injury was \$19. His average weekly wage for the previous year was \$18.09. On Monday after the accident he was examined by Dr. Cruse, a physician furnished by appellant. At the time of this examination the inguinal region and both testicles were swollen. He was at that time suffering from orchitis. Dr. Cruse gave him a prescription for medicine, which was filled

twice. On May 4, 1918, appellee went to see a physician of his own selection, who informed him that he had varicocele, and that it would be necessary to remove one of his testicles. On May 6, 1918, the left testicle was removed. Appellee lost six weeks from work at the time of the operation, after which he returned to his work with appellant, and continued to work for appellant as long as it had any need for his service. Appellant discharged appellee early in October, 1918, not because of any disability on his part, but for the reason that appellant had no further need for his services. The appellee's wages were increased from time to time, so that in May, 1918, his weekly wage was \$23. From and after August 3, 1918, he was paid \$24.50 per week. After he ceased to work for appellant he secured work at the Oil and Pump Works. At the time he filed his application for compensation with the Industrial Board, he was able to earn \$24.50 per week.

There was no evidence that the removal of the particular organ mentioned had or would in the slightest degree impair the future usefulness or oppor-

3. tunity of appellee, or that it had or would produce any disability for work, or to work, or a loss of any physical function. Notwithstanding the injury and operation, his earning capacity and every physical function remained unimpaired.

There was no evidence of a permanent partial disability. The award of the board is reversed, with directions to modify its findings and award in accordance with this opinion.

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PETER HAND BREWING COMPANY v. STAMPER.

[No. 9,966. Filed November 20, 1919.]

APPEAL.—Briefs.—Oral Argument.—Failure by Appellee.—Failure by appellee to file any brief or to appear at oral argument may amount to a confession of error that will justify a reversal.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by Peter Hand Brewing Company against Martin Stamper. From a judgment for the defendant, plaintiff appeals. *Reversed.*

D. J. Moran, for appellant.

NICHOLS, P. J.—Appellee has failed to file any brief, and has failed to appear at the oral argument. Such failure may amount to a confession of error that will justify a reversal. The following cases should be a warning to appellees not to neglect their cases: *Burroughs v. Burroughs* (1913), 180 Ind. 380, 103 N. E. 1; *Huddleston v. Huddleston* (1916), 184 Ind. 168, 110 N. E. 980; *Veit v. Windhorst* (1916), 184 Ind. 351, 110 N. E. 666; *Hogston v. Bell* (1916), 185 Ind. 536, 112 N. E. 883. This case involves the ruling of the court in sustaining appellee's demurrer to the complaint. In *City of Shelbyville v. Adams* (1916), 185 Ind. 326, 114 N. E. 1, a similar question was presented, but the appellee failed to file a brief. The judgment was reversed, with instruction to the court to set aside the ruling on appellee's demurrer, and for a resubmission of the same. In the instant case, however, we have examined the complaint, and we hold that it states a cause of action.

The judgment is reversed, with instructions to the

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court to overrule the demurrer to the complaint, and for further proceedings.

Batman, C. J., and Dausman, J., concur in result.

DULL v. BANK OF REDKEY, INDIANA.

[No. 9,955. Filed November 20, 1919.]

MONEY PAID.—Debt of Another.—Voluntary Payment.—Agreement to Repay.—Evidence of a ratification and of a promise to repay will support an action for reimbursement for money voluntarily paid to discharge the taxes of another.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by the Bank of Redkey, Indiana, against Welcome J. Dull. From a judgment for the plaintiff, defendant appeals. *Affirmed.*

John F. La Follette, Joseph G. Leffler, Walter L. Ball and A. E. Needham, for appellant.

McClellan, Hensel & Guthrie and Frank B. Jaqua, for appellee.

McMAHAN, J.—This action was commenced by the appellee against appellant to recover for labor performed in paying appellant's taxes and for taxes alleged to have been paid by it for appellant at his special request.

The appellant filed an answer in two paragraphs. The first was a general denial. The second alleged that the payment by appellee of appellant's taxes was voluntary. Appellee filed a reply to the second paragraph of answer, alleging that the appellant ratified

the acts of appellee in making such payment, and promised and agreed to reimburse and pay appellee. The cause was tried by a jury, and resulted in a verdict and judgment being rendered for appellee in the sum of \$127.30.

Appellant contends that the verdict is not sustained by sufficient evidence, and that the court erred in giving and in refusing to give certain instructions.

We have given careful consideration to the evidence and find that, although the jury would have been justified in finding that the payment of the taxes was voluntarily made, there is sufficient evidence to warrant a finding that the appellant ratified the act of appellee in making such payment, and thereafter promised and agreed to repay appellee. There being some evidence of ratification, it is sufficient to uphold the verdict. No exception is shown to have been taken to the giving or to the refusal to give any of the instructions to the jury.

No reversible error having been shown, the judgment is affirmed.

Nichols, J., not participating.

SARGENT PAINT COMPANY v. PETROVITZKY.

[No. 9,927. Filed November 20, 1919.]

1. MASTER AND SERVANT.—*Injuries to Third Persons.—Negligence of Servant.—Determination of Relation.*—Where the owner of a motor truck, by oral arrangement, furnishes the truck and its driver to another by the week, for the purpose of delivering goods sold by such other, and the driver negligently injures a third person while making such deliveries, the true test in determining who the master was, is, who had the right to control and direct the servant in the performance of the work. p. 359.

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2. **MASTER AND SERVANT.—Injury to Third Persons.—Relation of Master and Servant.—Question for the Jury.**—Where the owner of a motor truck by oral arrangement rents the truck with a driver to another at a fixed weekly rental, to be used in making deliveries of goods sold by such other, and retains and exercises no control over the process of delivery, and the driver negligently injures a third person while making such deliveries, the question of who is the master liable for the injury is one of fact for the jury. p. 368.
3. **MASTER AND SERVANT.—Injury to Third Person.—Action.—Relation of Master and Servant.—Evidence.**—In an action for injuries to a third person negligently caused by the driver of a motor truck, who together with the truck was furnished by the owner of the truck to the defendant at a fixed sum per week, to be used in delivering goods sold by it, and were actually so engaged when the injuries were inflicted, where the owner of the truck gave no orders at any time relative to said deliveries, nor as to the method, process or routing of the same, and where the driver made the deliveries from sales slips and orders received from the shipping clerk of defendant, *held* to sustain the verdict in so far as concerns its included finding that the driver at the time of the injury was the servant of defendant. p. 370.

From Marion Superior Court (100,789); *W. W. Thornton*, Judge.

Action by Pearl Petrovitzky against the Sargent Paint Company and another. From a judgment for the plaintiff against the named defendant only, such defendant appeals. *Affirmed*.

Charles E. Henderson, for appellant.

Beckett & Beckett, for appellee.

McMAHAN, J.—This action was commenced by appellee against the appellant and Roy Perkins to recover damages for personal injuries caused by appellee being struck and run over by a motor truck driven by one Harold Hays, who was alleged to have been the servant of appellant and Perkins. There was a verdict in favor of appellee against appellant, and in favor of Perkins, upon which judgment was rendered. Appellant filed a motion for a new trial, for the reasons that the verdict of the jury is not sustained by

sufficient evidence, is contrary to law, and that the court erred in giving, and in refusing to give, certain instructions. The error assigned is the overruling of the motion for a new trial.

This cause involves the question as to when a servant in the general employment of one person becomes, with regard to a particular transaction, the servant of another. Perkins owned the truck, kept it in repair, bought the oil and gasoline therefor, and employed Harold Hays to drive it. Hays was a chauffeur by occupation, and had been driving the truck three or four years prior to the time of the accident.

Appellant owned and operated a factory for making paint, also had a store where it sold paint at retail. About two years prior to the time of the accident appellant and Perkins entered into an oral arrangement, whereby Perkins was to furnish appellant a truck and driver for the purpose of delivering goods for appellant. Appellant was to, and did, pay Perkins \$35 a week for the use of the truck and driver. The exact nature of this arrangement is not clearly disclosed by the evidence. Mr. Perkins testified that he had two trucks, one of which he drove for the Stewart-Carey Glass Company, and the one which Harold Hays drove. When asked to state what arrangement he had with the appellant in connection with the delivery of its goods he said: "My arrangement with Mr. Sargent was to do the delivering for so much a week and furnish him a truck and driver. I hired the drivers, paid them and discharged them. I paid for the repairs on the truck, and for the gasoline and oil used in running it. Harold Hays drove the truck for the Sargent Paint Company. They directed him on his deliveries. The only directions I

gave him was to report to the Paint Company and after that I exercised no authority over him at all unless I wanted him to do something. I gave him no directions about his paint orders.”

Harold Hays testified that Perkins hired him and agreed to pay him \$15 a week. Perkins told him that he had made arrangements with the appellant to furnish appellant with a truck and driver and deliver goods for them, for which he (Perkins) was to receive \$35 a week. The witness was asked whether or not Mr. Perkins told him that he (Hays) would receive orders what to do, that they would consist of sale slips and that he (Hays) could route himself and deliver to the best advantage to take up the least time according to the sale slips, to which he answered: “No Sir, he did not tell me anything in regard to that because I was to learn that when I got there.” He also testified that Perkins told him that the appellant would show him the process of the work; that, when he got there each morning, he found there were sale slips made out of goods to be delivered; that he and the shipping clerk placed the goods in the car to the best advantage in making deliveries so as not to cover the ground twice. In making the deliveries no one gave him any orders to go a certain way. He was left to his own discretion in routing himself. When he made a delivery he would return to the appellant’s place of business and wait until other orders came in or until something was wanted from the warehouse, and that he went over to the warehouse for stock nearly every morning. Sale slips were made out for each delivery, indicating to whom and where the delivery was to be made. When making c. o. d. deliveries he collected the money and

turned the same over to appellant. He would know where to deliver the goods by the bill of sale, and would wait until the shipping clerk gave orders what to do. He obeyed these orders, and obeyed the orders of any one around the store, but did not obey orders of anybody except some one connected with the store. Sometimes he would haul things for the men there. He hauled a cabinet for one of the salesmen for his garage, and he hauled things for Mr. Sargent.

When asked what directions he received from Perkins when he first went to work with the paint company, and in testifying what Perkins said to him, he said: "He told me that they would show me the process of the work when I got to the Sargent Paint Company." He kept the truck at his home except in bad weather when he kept it at the garage; that he was required to be at appellant's store each working day of the week at seven o'clock in the morning and was required to deliver and haul anything he was asked to haul for the appellant. Sometimes at the request of Mr. Perkins he would drive the truck on Sundays and take people to picnics and different places, this being at times outside of which he was required to be at appellant's place of business. The name of appellant was painted on the truck.

The bookkeeper of appellant testified: "We had a contract with Perkins. He was to look after the delivering and see that our goods were delivered about the city for which we paid him \$35 a week. Roy Perkins' name was on the payroll. Harold Hays' was not."

Lambert Mack, appellant's order clerk, testified that: "Perkins was hired to do our hauling. I would get my orders in rotation and hand them to Hays, and

he would load and deliver them. I never told the direction in which he was to go or where he should go or how he should go. I handed him the orders and he delivered them. The orders were written, never gave any directions by word of mouth. The orders that were sent out by Hays were for goods we had sold and contracted to deliver. When the orders were gotten up I gave him a written slip. He would collect c. o. d. orders and bring in the money. When we had so many orders that I could not take care of them all with the truck, I would hire another wagon."

This is in substance all of the evidence throwing any light upon the nature of the agreement between the appellant and Perkins, and the method used in carrying it out and in carrying on the business of appellant in so far as the use of the truck and driver and the delivering of goods sold by appellant. Appellee was injured by reason of the negligence of Hays in driving the truck in question while delivering paint sold by appellant. The said arrangement between appellant and Perkins had been in existence about three years at the time of the accident, during all of which time Hays drove the truck, except for short periods when, for some reason not disclosed by the evidence, Perkins would send another driver to take his place.

Appellant in its brief says that all of the errors relied upon for a reversal can be determined by ascertaining whether Hays was the servant of appellant or of Perkins.

Appellant says that the question of what constitutes an independent contractor is ordinarily one of

mixed law and fact, but that where the evidence is oral and is sufficient to establish the existence of some relation, and where it is uncontradicted and susceptible of but a single inference, the question of what relation is thereby shown to exist is one of law and that, under the evidence in this case Hays, as a matter of law, was the servant of Perkins and not of appellant. Appellee insists that the question as to whose servant Hays was, at the particular time he inflicted the injuries upon appellee, was, under the evidence, a question of fact for the jury, and not a question of law.

The rule that one who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the

1. course of the service is elementary. But, however, clear as the rule may be, its application to the varied affairs of life is not always easy, as the facts which place a given case within or without the rule cannot always be ascertained to a certainty. When the attempt is made to impose upon the master the liability for the consequences of the servant's neglect, it sometimes becomes necessary to ascertain who was the master at the very time of the negligent act or omission. One may be in the general service of another and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation. The true test in determining who the master is, in a case of this character, is not who actually did control the actions and movements of the servant in doing the work, but who had the right to control.

If appellant was not the owner of a truck and did not have any person in its employ who could do its hauling and delivering, it had the right to enter into an agreement with Perkins to furnish a truck and man to do this work. If in this case Perkins furnished the truck and driver to do appellant's work and placed the driver, Hays, under the control of appellant in the performance of that work, Hays became *pro hac vice* the servant of appellant. But, on the other hand, if the agreement was that Perkins should himself do the work for a consideration, with servants of his own selection, retaining the direction and control of such servants, he would be the master and liable for the negligent acts of such servant in doing the work, though the work was being done for the ultimate benefit of appellant. In determining who is the master, we must inquire whose is the work being performed. As before stated, this is answered by ascertaining who has the power to control and direct the servant in the performance of the work. The rule just stated is sustained by the great weight of authority, although the language used in stating the rule may not always be the same.

In the case of *Higgins v. Western Union Tel. Co.* (1898), 156 N. Y. 75, 50 N. E. 500, 66 Am. St. 537, where a similar question was under consideration, the court stated the rule as follows: "The question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. * * * The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct." This test and rule has been applied and followed in many cases. Among them are *Parkhurst v. Swift* (1903), 31 Ind.

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App. 521, 68 N. E. 620; *Indiana Iron Co. v. Cray* (1898), 19 Ind. App. 565, 48 N. E. 803; *Standard Oil Co. v. Anderson* (1909), 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; *Kilroy v. Delaware, etc., Canal Co.* (1890), 121 N. Y. 22, 24 N. E. 192; *Wyllie v. Palmer* (1893), 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; *Anderson v. Boyer* (1898), 156 N. Y. 93, 50 N. E. 976; *Murray v. Dwight* (1900), 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673; *Delaware, etc., R. Co. v. Hardy* (1896), 59 N. J. Law 35, 35 Atl. 986; *Consolidated Fireworks Co. v. Koehl* (1901), 190 Ill. 145, 60 N. E. 87; *Grace & Hyde Co. v. Probst* (1904), 208 Ill. 147, 70 N. E. 12; *Kimball v. Cushman* (1869), 103 Mass. 194, 4 Am. Rep. 528; *Johnson v. Boston* (1875), 118 Mass. 114; *Delory v. Blodgett* (1904), 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. 328; *The Elton* (1906), 142 Fed. 367, 73 C. C. A. 467.

“The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury, and that such person alone is liable. The case of master and servant is an exception to the rule, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master. * * * The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, when their general em-

ployer is interested in the work. * * * The true test in such cases is to ascertain who directs the movements of the person committing the injury." *Higgins v. Western Union Tel. Co.*, *supra*.

In *Foster v. Wadsworth-Howland Co.* (1897), 168 Ill. 514, 48 N. E. 163; *id.*, 50 Ill. App. 513; *id.*, 60 Ill. App. 600, cited by appellant, the question under consideration was whether an instruction directing a verdict for the defendant was erroneously given. The court said: "The driver of the wagon which caused the injury *was not an employee of appellee nor subject to its orders, but was under the control and in the employ of Smiddie. Smiddie contracted to do the hauling, which* contract necessarily carried with it the duty to employ such assistants as might be required. His relationship with appellee was therefore in the nature of a contractor, rather than servant. * * * Appellee exercised no control over the driver of this wagon; it did not employ him; it did not pay him; it had no right to discharge him, nor had it the right to direct how or in what manner his work should be done, further than it should conform with its agreement made with Smiddie. Under the circumstances the driver of the wagon was not the servant of appellee, and, consequently, there could be no liability against it." (Our italics.) The court based its decision on the case of *Wood v. Cobb* (1866), 13 Allen (Mass.) 58, where the plaintiff was struck by a wagon driven by one Wheeler, whose wagon had just left the place of business of the defendants loaded with their goods. The court further said: "It developed that the defendants *contracted* with one Foster to deliver *all* their goods, and Foster, being sick, had asked permission to have Wheeler drive his wagon.

(Our italics.) * * * 'The testimony of the witness introduced by the defendants would warrant no other inference than that the person who was in charge of the horses and wagon at the time the injury was done to the plaintiff was not in the employment or service of the defendants, but was acting as a servant of the third person, who exercised an independent employment in no way subject to the command or control of the defendants as to the method in which it should be carried out.' "

In *Burns v. Michigan Paint Co.* (1908), 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816, the only evidence to show that the driver was a servant of appellee was the fact that appellee's sign was attached to the wagon. The court held that the undisputed evidence showed that the driver of the wagon was an independent contractor, and that under such circumstances there could be no recovery as to the paint company.

In *Tuttle v. Embury, etc., Lumber Co.* (1916), 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C 664, the appellant furnished his own team and was hauling lumber at a fixed price per thousand. In discussing the question, the court said: "In some cases much stress is laid upon the fact that the work to be performed is of an indefinite amount subject to discharge and control in that regard. Others, whether the employment is of a general, independent character, like that of draymen and common carriers, becomes the controlling question. We are of the opinion that the test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between the independent contractor and a servant or

agent. * * * In our opinion there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor. His work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. * * * The most that can be said for the respondents is that, upon the evidence in the record, *it might be for a jury to say*, under proper instructions, whether the company participated and directed in the work of Tuttle to such a degree that the relation of master and servant existed, or whether he was an independent contractor. * * * *Whether or not the relation of master and servant exists in a given case, under oral contract, is often a question of fact, or of mixed law and fact, and is to be proved like any other question.*" (Our italics.)

In *W. S. Quinby Co. v. Estey* (1915), 221 Mass. 56, 108 N. E. 908, the court said: "It was for the jury to say what the contract of the parties was and what conclusions should be drawn from the evidence concerning the relation of Day to the plaintiff and to the defendant. * * * The jury were authorized to find that Day was the servant of the defendant and not the servant of the plaintiff." In this case, the appellant hired to appellee a horse and wagon and driver for the sum of \$29 per week to deliver merchandise for the plaintiff. The driver, Day, through his negligence, lost certain property belonging to the plaintiff. The action was brought by plaintiff against appellee to recover the value of such property.

In *Chicago, etc., Brick Co. v. Campbell* (1904), 116 Ill. App. 322, appellee was injured by a collision between a street car and a wagon loaded with brick

belonging to Kimball and Dymond. The action was brought against the appellant and Kimball and Dymond. At the close of the evidence the cause was dismissed as to Kimball and Dymond. There was a verdict and judgment against appellant. Along with the general verdict, the jury answered certain interrogatories, the fourth reading as follows: "Was Mohr, the driver of the wagon in question, the servant and agent of the above-named defendant (Chicago Hydraulic Press Brick Co.)?" Answer, "Yes." Kimball and Dymond were partners engaged in the business of teaming for others. At the time of the accident, and for several years prior thereto, they had an oral contract with the brick company to do its teaming at its west yards, where the wagon causing the injury to appellee was loaded. Under this contract appellant paid Kimball and Dymond a certain price per load of brick. The wagons and horses were kept at appellant's yards, but they were maintained by Kimball and Dymond, and in charge of their employes. The driver of the team, Mohr, was employed and paid by Kimball and Dymond. The trial court refused to instruct the jury to return a verdict for the defendant. Held not error. Appellant contended that the court erred in submitting certain interrogatories, including the fourth, to the jury. The court, in discussing these interrogatories, said: "The third interrogatory relates to an ultimate fact in the case, as does also the fourth, when the whole evidence is considered. It was not, in our opinion, error to submit these questions to the jury, since there was evidence to justify them and they relate to ultimate facts."

Driscoll v. Towle (1902), 181 Mass. 416, 63 N. E.

922, was an action by Driscoll against Towle for personal injuries caused by being struck by a horse and wagon driven by one Keenan. The court directed a verdict for the defendant. The only question was whether there was any evidence that Keenan was the servant of Towle. Towle was engaged in general teaming. He owned the horse and wagon, and employed Keenan and paid him his wages. For some time Keenan had been carrying property for the Boston Electric Light Company under some arrangement between the latter and Towle. Early in the morning of each day Keenan took the horse and wagon from Towle's stable and reported to the light company. An employe of that company gave him his orders as to what to do, and where to go, and he spent the day in carrying out those orders. The court, in discussing the evidence and the action of the court, said: "We are of the opinion that these facts are at least evidence that Keenan was the defendant's servant. * * * At the most it was for the consideration of the jury and did not justify directing a verdict for the defendant as matter of law."

In *Foster v. City of Chicago* (1902), 197 Ill. 264, 64 N. E. 322, the city entered into a written contract with John Sheehy, providing that Sheehy should furnish all the labor and materials and do all the work necessary to fully complete a certain sewer. John Shea was a laborer employed by Sheehy on said work, and in the course of his employment was killed. The action was commenced against the city on the theory that Shea was a servant of the city. The contract being in writing, the court correctly held that it was a question of law for the court to say whether the injured party was a servant of the city or of Sheehy.

The true test in such cases is to ascertain who directed the movement of the person committing the injury. When one person lends a servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. *Parkhurst v. Swift, supra*.

Of the cases just reviewed, all of which were cited by appellant, *Tuttle v. Embury, etc., Lumber Co.; W. S. Quinby Co. v. Estey, Chicago, etc., Brick Co. v. Campbell, and Driscoll v. Towle* held that the question whether the driver was the servant of the defendant was a question of fact to be submitted to the jury. In *Foster v. City of Chicago, supra*, the contract was in writing, the construction of which was necessarily a question of law for the court.

In *Falender v. Blackwell* (1906), 39 Ind. App. 121, 79 N. E. 393, the court held that it was proper to submit the question to the jury, and that the verdict was supported by the evidence. In *Indiana Iron Co. v. Cray, supra*, the jury returned a special verdict, and appellant was contending that on the facts as found it should have judgment. In *Zimmerman v. Baur* (1894), 11 Ind. App. 607, 39 N. E. 299, the question arose upon demurrer to the complaint and answer. In *Marion Shoe Co. v. Eppley* (1914), 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D 220, there was no conflict in the evidence, and but one conclusion could be drawn from it. In *Teagarden v. McLaughlin* (1882), 86 Ind. 476, 44 Am. Rep. 332, a father had let a contract to a minor son to clear a certain tract of land. The son negligently started a fire and destroyed property of another. The father when sued asked the court to

instruct the jury that he was not liable for the negligence of the son, inasmuch as the son was an independent contractor. The court held that the instruction was properly refused, on the theory that as a matter of law the minor son was under the control of his father.

Without extending this opinion in a further review of the authorities, it is sufficient to say that the courts of the country are practically unanimous in

2. holding that under the circumstances as disclosed by the evidence in this case, the question is one of fact for the jury. *Crockett v. Calvert* (1856), 8 Ind. 127; *Falender v. Blackwell*, *supra*; *Kawneer Mfg. Co. v. Kalter* (1918), 187 Ind. 99, 118 N. E. 561; *Standard Oil Co. v. Allen* (1918), (Ind. App.), 121 N. E. 329; *Dalrymple v. Covey Motor Car Co.* (1913), 66 Ore. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Lorenzo v. Manhattan Steam Bakery* (1917), 178 App. Div. 706, 165 N. Y. Supp. 847; *Banfield v. Whipple* (1865), 10 Allen (Mass.) 27, 87 Am. Dec. 618; *Consolidated Fireworks Co. v. Koehl*, *supra*; *Columbia School Supply Co. v. Lewis* (1916), 63 Ind. App. 386, 115 N. E. 103; *Decatur R. Co. v. Industrial Board* (1917), 276 Ill. 472, 114 N. E. 915; *Minor v. Stevens* (1911), 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, cited by appellant. *Howard v. Ludwig* (1902), 171 N. Y. 507, 64 N. E. 172; *Cain v. Hugh Nawn, etc., Co.* (1909), 202 Mass. 237, 88 N. E. 842; *Tuttle v. Embury, etc., Lumber Co.*, *supra*; *Glover v. Richardson, etc., Co.* (1911), 64 Wash. 403, 116 Pac. 861; *McNamara v. Leipzig* (1917), 167 N. Y. Supp. 981; *W. S. Quinby Co. v. Estey*, *supra*; *Chicago, etc., Brick Co. v. Campbell*, *supra*; *Driscoll v. Towle*, *supra*.

What contract, as an independent contractor, did Perkins have with appellant? When would his contract with appellant be completed? Contracts are entered into for the purpose of acquiring rights on the one hand and imposing obligations on the other. Could Perkins have quit work at any time without incurring any liability to appellant? Could appellant at any time have discharged Perkins or dismissed Hays, the driver of the truck, without any legal liability to Perkins to respond in damages for breach of contract? To each of these questions upon the record there could be no liability. Hays or Perkins could have ceased to labor for appellant at any time, and the appellant had a right to dispense with their labor any time it saw fit. *Muncie Foundry, etc., Co. v. Thompson* (1919), (Ind. App.) 123 N. E. 196.

There is no claim that Perkins had a contract to deliver all the goods sold by appellant. When there were more orders than Hays could deliver with the truck, appellant would hire some one with a horse and wagon to help out, as testified to by the order clerk.

The work which Hays was called upon to do was not complicated, and according to the testimony of Perkins was not specifically described in the arrangement made with appellant. It did not require elaborate terms in order to exercise control over the driver of the truck while the work was in progress. No definite arrangements were made regarding the manner in which the goods were to be delivered. Perkins did not visit the scene of the work to ascertain what was to be done or how it could be performed. He did not ask any questions about the work or give any directions as to how it should be done. He was

not present at any time during its progress, and assumed no personal control over the same. The decision as to how and when goods should be delivered was made by appellant, and whatever directions in that regard were necessary were given by it.

We hold that, under the evidence, the question whether the driver of the truck was, at the time of the injury to appellee, the servant of appellant

3. was properly submitted to the jury, and that the verdict is sustained by the evidence. There was therefore no error in overruling the motion for a new trial. Judgment affirmed.

JENNINGS ET AL. v. HEMBREE, ADMINISTRATOR.

[No. 10,049. Filed November 20, 1919.]

1. SUBMISSION OF CONTROVERSY.—*Presumptions on Appeal*.—In a proceeding under §§579, 580 Burns 1914, §§553, 554 R. S. 1881, by agreed statement of fact, no presumption can be indulged in favor of the judgment of the trial court. p. 372.
2. SUBMISSION OF CONTROVERSY.—*Language Used*.—*Construction*.—The language used by the parties in an agreed statement of fact will be given its common, ordinary meaning. p. 374.
3. LANDLORD AND TENANT.—*Lease*.—*Rent*.—An agreement whereby a life tenant was to receive as rent a fixed share of the crop raised, such rental to be harvested and delivered to her by the tenants at gathering time, was a lease and the relation between the parties was that of landlord and tenant. p. 374.
4. LIFE ESTATES.—*Death of Life Tenant*.—*Rents Not Due*.—*Remainder*.—Rent stipulated in favor of a life tenant, in the form of a fixed share of crop growing at her death, and not to be delivered until some months thereafter, is annexed to the real estate and goes to the remainderman. p. 374.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Jennings v. Hembree, Admr.—71 Ind. App. 370.

Action by John F. Hembree, administrator of the estate of Mary Workman, against George P. Jennings, Eva Jennings and Cora Workman. From a judgment for the plaintiff, defendants appeal. *Reversed.*

Frank E. Gulkison, for appellant.

F. Gwin, for appellee.

NICHOLS, P. J.—This action was commenced by the appellee against the appellants in the Martin Circuit Court by complaint, which was afterwards withdrawn and the case submitted to the court upon an agreed statement of facts, which, so far as material to this decision and omitting verification, is as follows: Plaintiff's decedent was the owner of a life estate, for the period of her own life, in certain real estate located in Martin county, Indiana. Her title and ownership of said real estate ceased at her death. On or about April 1, 1915, plaintiff's decedent rented portions of said real estate to Tillman Hembree, Lawrence Hembree and Robert Sutton, to be tilled to corn, said decedent to receive as rental for said lands so rented to said tenants the following portion of crops, to wit: one-third of the corn raised on certain portions thereof and one-half of the corn raised on the remainder thereof so tilled, which said rental was to be harvested and delivered to said decedent in a crib on said premises at gathering time, about December 15, 1915. Said tenants were to pay nothing as rental for said real estate, except the share of the crop as above mentioned. Plaintiff's decedent died on August 9, 1915. Eva Jennings, wife of defendant George P. Jennings, and Cora M. Workman were, and still are, the owners of the fee in and to all the real

estate of which plaintiff's decedent was the owner of a life estate, including all the lands which said tenants tilled to corn as aforesaid. The aforesaid tenants gathered the rental on said premises tilled to corn as aforesaid, and placed the same in a crib on said premises, and the said rent corn includes and is all the corn for the possession of which plaintiff has brought suit in this action. The remaindermen and fee owners of said real estate, Eva Jennings, and Cora M. Workman, have possession of said rent corn, claiming ownership thereof, and refuse to permit plaintiff to take possession thereof. The defendant, George P. Jennings has not and does not now claim said corn or any part thereof. The plaintiff, John F. Hembree, is now the duly qualified and acting administrator of the estate of said deceased, Mary Workman.

Upon these facts the court stated conclusions of law in favor of appellee.

After exceptions by appellants, the court entered judgment upon the facts and conclusions aforesaid in favor of the appellee, from which judgment the appellants now prosecute their appeal. The only question for our consideration is the action of the court in rendering judgment for appellees.

The proceeding is under §§579, 580 Burns 1914, §§553, 554 R. S. 1881, by the provisions of which the foregoing statement of the case with the sub-

1. mission to and judgment of the court takes the place of the pleadings and constitutes the record, and judgment must be rendered thereon in favor of the party entitled thereto, taking the facts as stated to be true. No presumption can be indulged in favor of the judgment of the trial court, for the reason that this court has the same means as the trial court of

reaching a correct conclusion of law upon the agreed facts of the case, which will be considered by it the same as if it were trying the case originally. *Day v. Day* (1885), 100 Ind. 460; *Henes v. Henes* (1892), 5 Ind. App. 100, 31 N. E. 832; *Templeton v. Board, etc.* (1909), 44 Ind. App. 381, 89 N. E. 410.

Nor is this a case in which the court is called upon to construe the contract between appellee's decedent and her undertenants, but it is a case in which the facts have been agreed upon by the parties, and it is only left for the court to decide what the law is as applied to such facts so agreed upon. It is contended by the appellee that the undertenants of the appellee's decedent occupied to her the relation of a cropper, that such decedent was the owner of an undivided interest as a tenant in common of such crops with her undertenant, and that therefore such undivided interest passed to her administrator as personal property, and not to the heirs as rents not accrued at the time of the death of the life tenant. This contention, however, does not seem to be in harmony with the facts as agreed upon. It will be observed that it was agreed as a fact that the decedent *rented* the real estate to a certain number of *tenants*; by the terms of the contract the decedent was to receive as *rental* certain portions of the crops; *rental* was to be harvested and delivered to the decedent in a crib on the premises; the tenants were to pay the *rent*; the tenants gathered the *rental*, and the *rent* includes all the corn for which suit was brought and the remaindermen claim the *rent* corn.

The parties have themselves chosen the language in which to express the facts that control this case,

and it is for the court to give such language its common ordinary meaning. With such language before us we must hold that the contract between the appellee's decedent and the under-tenant was a lease and not a cropper's agreement. In the case of *Chicago, etc., R. Co. v. Linard* (1884), 94 Ind. 319, 328, 48 Am. Rep. 155, it is said: "The sounder view undoubtedly is, that where the terms of the contract are such as to show that the contracting parties understood and intended that the relation of landlord and tenant should be created thereby, the contract will be a lease, although the landlord is to be compensated for the use of the land by a portion of the crops raised; * * *." If such a contract was a lease, then the compensation of appellee's decedent was by way of rents. In the case of *Vawter v. Frame* (1911), 48 Ind. App. 481, 483, 96 N. E. 35, it is said: "Rents due to a life tenant, at his death are collectible by his personal representative. Rents have not accrued until they become due, and grain rent, to be paid at threshing time, does not become due until that time. Rents, until they become due, are annexed to the real estate, and thus go with the reversion to the remainderman." Other authorities are cited sustaining this proposition. In this case the decedent was to receive her rental for such lands so rented to said tenants in the following portion of crops, to wit: One-third of the corn raised on certain portions thereof, and one-half of the corn raised on the remainder thereof, and each said rental was to be harvested and delivered to said decedent in a crib on said premises at gathering time about December 15, 1915. There was then nothing due to the decedent as rental until the gathering time about December 15, 1915. This

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being the case, such rents were annexed to the real estate, and went with the reversion to the appellants as remaindermen.

The trial court erred in its conclusion of law. The judgment is reversed at the costs of the appellee, and the cause is remanded, with instructions to the court to restate its conclusions of law, and to render a judgment in favor of the appellants.

PRINZ v. GRAYSON ET AL.

[No. 10,015. Filed November 20, 1919.]

1. **APPEAL.—Evidence.—Sufficiency.**—The decision of the trial court cannot be disturbed where the evidence fairly tends to support it. p. 376.
2. **NEW TRIAL.—Quiet Title.—Cross-Complaint.—Motion for New Trial on Part of Issues.—Effect.**—In a suit to quiet title, where a cross-complaint to quiet the title to and for possession of part of the lands involved has been filed, a new trial cannot be granted upon the cross-complaint only, where there has been a finding against the defendant thereon, although there was also a finding against the plaintiff upon the complaint. p. 376.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by Robert Grayson and another against Allie Prinz. From a judgment that the parties each take nothing, the defendant appeals. *Affirmed.*

Henry A. Burt and *James E. Taggart*, for appellant.

Henry F. Dilger and *Joseph H. Warder*, for appellees.

DAUSMAN, J.—Appellees instituted this action

against appellant to quiet title to two tracts of land. Appellant filed a pleading, denominated "cross-complaint," to quiet her title as against the appellees to the first tract, and also to recover possession of said first tract and damages for the unlawful possession thereof by the appellees. As to the second tract, appellant filed a disclaimer. The cause was submitted for trial to the court without a jury. The court made a special finding of facts, stated conclusions of law, and rendered judgment that appellees take nothing by their complaint, and that appellant take nothing by her cross-complaint. Appellant filed a motion for a new trial as to her "cross-complaint" only, and specified as grounds therefor that the decision was not sustained by sufficient evidence, and is contrary to law. The only error assigned is the overruling of the motion for a new trial.

We cannot disturb the action of the trial court for two reasons: (1) The evidence tends fairly to support the decision; and (2) in this case a new trial could not be granted as to the "cross-complaint" only. *Topp v. Standard Metal Co.* (1911), 47 Ind. App. 483, 94 N. E. 891; *Kessans v. Kessans* (1915), 58 Ind. App. 437, 108 N. E. 380; *Johnson v. McCulloch* (1883), 89 Ind. 270; *Oglebay v. Todd* (1906), 166 Ind. 250, 76 N. E. 238.

Judgment affirmed.

Nichols, J., concurs in result.

LOUISVILLE AND SOUTHERN INDIANA TRACTION
COMPANY v. COTNER.

[No. 9,906. Filed November 20, 1919.]

1. **APPEAL.—Complaint.—Motion to Make More Specific.—Harmless. Error.**—Where the averments of plaintiff's injuries were such that the motion to make them more specific might properly have been in part sustained, but where from the whole record it is apparent that no rights of the defendant were prejudiced thereby, the overruling of the motion is not reversible error. p. 378.
2. **PLEADING.—Street Railroads.—Negligence.—General Allegation.—When Sufficient.**—The general averment that defendant "then and there by its agents and servants carelessly and negligently ran said electric car upon and against plaintiff" will withstand demurrer for want of facts in the absence of contradictory specific allegations. p. 379.
3. **STREET RAILROADS.—Operation Outside City Limits.—Crossings.—Signals.**—A street railway company when operating its cars across public highways outside the corporate limits of a city must do so with due regard for the safety of travelers upon such highways, and while there is no statutory requirement of crossing signals against such a company, the circumstances may be such as to require some warning of the approach of cars to be given. p. 379.
4. **TRIAL.—Instructions.—Street Railroads.—Crossings.—Signals.**—Where the evidence showed that the crossing on which plaintiff was alleged to have been injured outside the city limits, was, as defendant well knew, much used by pedestrians and vehicles, both day and night, and was located near a curve in appellant's tracks, an instruction that there should have been some warning of the approach of the car was not erroneous. p. 379.
5. **STREET RAILROADS.—Crossings.—Intoxicated Persons.—Known Peril.**—A street railway company owes the same duty to avoid injuring an intoxicated person seen by the motorman upon the track in a position of peril as if such person were sober. p. 381.
6. **TRIAL.—Instructions.—Street Railroads.—Crossing Accidents.—Location of Plaintiff.—Question for the Jury.**—Where the evidence was conflicting as to whether the plaintiff was, when struck, standing on the highway crossing or was a trespasser on the right of way of the street railway company some distance from the crossing, his location was a question of fact for the jury, and an instruction assuming that he was upon the crossing was erroneous. p. 381.
7. **TRIAL.—Instructions.—Measure of Damages.—Items Not Pleaded**

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in Evidence.—Instruction Not Limited.—An instruction is erroneous that authorizes the jury to assess all damages “as shown by the evidence,” where evidence was heard of an item of damages not averred in the complaint. p. 381.

8. *APPEAL.—Error.—Harmlessness Not Apparent.—Reversal.*—Where, after a careful examination of the entire record, the Appellate Court is unable to say that the correct result was reached, or that the errors noted in instructions given were harmless, a reversal will follow. p. 382.

From Washington Circuit Court; *William H. Paynter*, Judge.

Action by Isaac Cotner against the Louisville and Southern Indiana Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

George H. Voight and *George H. Hester*, for appellant.

L. A. Douglas, *John W. Ewing* and *W. W. Hottel*, for appellee.

REMY, J.—Action for damages for personal injuries. Judgment for appellee. Errors assigned and presented are: (1) Overruling motion to make complaint more specific; (2) overruling demurrer to complaint; and (3) overruling motion for a new trial.

The motion to make the complaint more specific was not directed to the allegations of negligence, but

to the averments of the complaint as to the

1. nature and extent of appellee’s injuries, and

as to the damages resulting therefrom. The complaint is subject to criticism for lack of certainty in the particulars complained of, and the motion might with propriety have been in part sustained. It is apparent, however, from the entire record that the rights of appellant were in no way prejudiced. The overruling of the motion was not reversible error. *S. W. Little Coal Co. v. O’Brien* (1917), 63 Ind. App.

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504, 113 N. E. 465, 114 N. E. 96; *Grass v. Ft. Wayne, etc., Traction Co.* (1908), 42 Ind. App. 395, 81 N. E. 514.

The complaint charges that while appellee was upon the tracks of appellant's electric railway at a certain public highway crossing, he was struck

2. by one of appellant's cars, resulting in the injuries of which complaint is made. It will not be necessary to set out the complaint. Although it is by no means a model pleading, it does formally aver that appellant railway company "then and there by its agents and servants carelessly and negligently ran said electric car upon and against said plaintiff." In the absence of a statement of specific facts showing otherwise, this is a sufficient averment of negligence to withstand a demurrer for want of facts. *Citizens St. R. Co. v. Lowe* (1894), 12 Ind. App. 47, 39 N. E. 165; *Lake Erie, etc., R. Co. v. Moore* (1908), 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506. It cannot be said that the general allegation of negligence was overborne by the specific allegations set forth in the complaint. The court did not err in overruling the demurrer to the complaint.

Error is predicated upon the action of the court in giving to the jury instructions numbered 4, 16, 17 and 24, requested by appellee.

By No. 4 the court instructed the jury that the "obligations of railroads and interurban railroads and travelers at highway crossings are mutual;" that the whole duty to avoid a collision is not imposed upon the traveler, and that the right of the railroad to precedence at the crossing "is conditioned upon the train giving due and timely warning." Appellant at the time in question was operating a street car system in the city of New

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Albany, and as a part of such system furnished electric railway service between said city and a nearby suburban settlement. Appellee averred in his complaint, and there was evidence tending to show, that appellee received the injuries complained of at a public crossing outside the corporate limits of said city. Appellant contends that the giving of this instruction is error, because there is no statutory or common-law duty on the part of those operating a street car to give a warning signal upon approaching a crossing. In the operation of the car at the time and place in controversy appellant was exercising the rights, powers and privileges of a street railway company (*Mich. Cent. R. Co. v. Hammond, etc., Elec. R. Co.* [1908], 42 Ind. App. 66, 83 N. E. 650), and the case was tried upon that theory. It is apparent that the words "interurban railroads" were inadvertently used in the instruction, instead of the expression "street railroads operating outside the corporate limits of a city;" but appellant makes no objection to the instruction for that reason. While there is no statutory obligation on the part of a street railway company when operating its cars across public highways outside the corporate limits of a city to give crossing signals, nevertheless such a company when so operating its cars must do so with due regard for the safety of travelers upon such highways. The evidence in this case shows that the crossing on which appellee was alleged to have been injured was, as appellant well knew, much used by pedestrians and vehicles, both day and night, and was located near a curve in appellant's tracks. The instruction does not specify the kind of warning that should have been given. The most that can be said is that the instruction charged the jury that, under the facts and circumstances of

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this case, there should have been some warning of the approach of the car. There was no error in giving this instruction.

There was some evidence tending to show that appellee was intoxicated at the time of the collision which resulted in his alleged injuries, and the

5. court by instruction No. 16 charged the jury that, if it found from the evidence that the motorman saw appellee "upon the track in a position of peril in time by the exercise of ordinary care under the circumstances to avoid injuring him," but failed to exercise such care, and such failure proximately resulted in the injuries complained of, then the fact, if it be a fact, that appellee was intoxicated, would make no difference, since appellant "owed the same duty to the intoxicated man in like circumstances and conditions as to one sober." The giving of this instruction was not error.

An important issue of fact at the trial was whether appellee when struck was standing on the highway crossing, or was a trespasser upon appellant's

6. right of way some distance from such crossing; and on this issue there was a sharp conflict in the testimony. More witnesses, however, testified that he was not upon the crossing. By instruction No. 17, which charged the jury as to the respective rights and duties of the parties at the crossing, the trial court assumed that appellee was at the time upon the highway crossing. This was an invasion of the province of the jury, and was error. *Manion v. Lake Erie, etc., R. Co.* (1907), 40 Ind. App. 569, 80 N. E. 166.

Evidence was heard tending to prove that shortly after he received his alleged injuries appellant, by or through the influence of appellant's agents,

7. was placed in jail, where he remained over night. The incarceration of appellee was not

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averred in the complaint as an item of damages, and by instruction No. 24, which was on the measure of damages, the court authorized the jury to assess in favor of appellee any and all damages sustained by him "as shown by the evidence." The courts of appeal of this state have many times held that the giving of such an instruction is error. *Stewart v. Swartz* (1914), 57 Ind. App. 249, 106 N. E. 719; *Monongahela River, etc., Co. v. Hardsaw* (1907), 169 Ind. 147, 81 N. E. 492.

We are not unmindful of the provision of §137 of the Code (§407 Burns 1914, §398 R. S. 1881) that the courts must in every stage of the action disregard any error in the proceedings "which does not affect the substantial rights of the adverse party;" and that "no judgment can be reversed or affected by such error;" but after a careful examination of the entire record, we cannot say that the correct result was reached, and that the errors of the trial court in giving instructions Nos. 17 and 24 were not harmful.

Judgment reversed, with instructions to grant a new trial.

EQUITABLE SURETY COMPANY v. TAYLOR ET AL.

[No. 9,651. Filed December 20, 1918. Rehearing denied March 6, 1919. Transfer denied November 20, 1919.]

1. APPEAL.—*Right of.*—*Statutes.*—*Compliance.*—The right of appeal is purely statutory, and a party seeking to avail himself thereof must comply with the statute providing therefor. p. 385.
2. APPEAL.—*Term Time.*—*Bond.*—*Approval.*—*Equivalent Methods.*

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- To perfect a term-time appeal, §679 Burns 1914, §638 R. S. 1881, requires that the bond be filed and approved at the term at which the appeal is granted, or else that the court fix the amount of bond and name and approve the sureties at such term and that the bond be filed in accordance therewith and within the time granted therefor by the court as shown by the record. p. 385.
3. **APPEAL.—Bond.—Entry.—Construction.—General Rules.**—The rule that every clause and word of a written instrument should, when possible, be given some meaning, and a harmonious whole be made to appear, applies to the construction of an entry granting an appeal and fixing bond therefor. p. 387.
 4. **APPEAL.—Final Judgment.—Motion for New Trial Filed After Judgment.—Ruling Thereon.**—The ruling on the motion for new trial, made after the entry of judgment, is taken as the final judgment within the meaning of the statute governing term-time appeals in civil cases. p. 387.
 5. **APPEAL.—Term Time.—Bond.—Sureties.—Approval After Term.**—Where the court, during the term in which final judgment is rendered, fails to approve either the appeal bond or surety, such failure cannot be cured by an approval made at a subsequent term. (*Penn., etc., Plate Glass Co. v. Poling* [1913], 52 Ind. App. 492, 100 N. E. 83, and *Ashley v. Henderson* [1904], 32 Ind. App. 242, 69 N. E. 469, in part disapproved.) p. 387.
 6. **APPEAL.—Term Time.—Bond.—Sureties.—Approval.—Record.**—Where an entry shows appeal granted, bond fixed and surety named "subject to the approval of the court," neither the bond nor surety is shown to have been approved. p. 387.
 7. **APPEAL.—Perfecting.—Jurisdiction.—Joinder in Error.—Dismissal.**—Where an ineffectual attempt has been made to perfect a term-time appeal and no effort has been made to perfect the same as a vacation appeal, and appellees have not joined in error, a motion to dismiss for want of jurisdiction will be sustained. p. 389.

From Delaware Circuit Court; *Frank Ellis*, Judge.

Action by Jesse B. Taylor and others against the Equitable Surety Company. From a judgment for the plaintiffs, defendant appeals. *Appeal Dismissed.*

Major A. Downing, for appellant.

Kittinger & Diven, Leffler Ball & Needham, for appellees.

BATMAN, P. J.—Appellant has attempted to perfect this appeal under §679 Burns 1914, §638 R. S. 1881, which reads in part as follows: "When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the court shall approve, and within such time as it shall direct, payable to the appellee," etc. The record discloses that the judgment in this cause was rendered on March 1, 1916; that thereafter on March 29, 1916, the same being the seventy-fifth judicial day of the January term, 1916, of the Delaware Circuit Court, appellant filed its motion for a new trial, which was overruled on the same day, and thereupon the following entry was made: "And the defendant, Equitable Surety Company, prays an appeal to the Appellate Court, which prayer is granted upon the filing, within thirty days from this date, of an appeal bond with Aetna Accident and Liability Co. of Hartford, Conn. as surety in the penal sum of Ten Thousand (\$10,000) Dollars, subject to the approval of the court." On April 21, 1916, the same being the twenty-first judicial day of the April term, 1916, of said court, appellant filed an appeal bond in open court, in the amount and with the surety named in said order, which bond was then inspected and approved by the court. On June 24, 1916, appellant filed a transcript of the proceedings in this cause, together with its assignment of errors. in the office of the clerk of this court.

On October 19, 1916, appellees filed a motion to dismiss the appeal upon two grounds, viz.: (1) That neither the appeal bond, nor the surety thereon, was

approved during the term at which the judgment was rendered, as required by §679, *supra*. (2) That no sufficient assignment of errors was filed by appellant in this court. Action on this motion was postponed until the final hearing, and is now before us for determination.

It should be borne in mind that the right of appeal is purely statutory, and a party who seeks to avail himself of such remedy must comply with the

1-2. statute providing for the same. *Blose v. Meyers* (1914), 58 Ind. App. 34, 107 N. E. 548. It is well settled that, in order for a party to bring himself within the provisions of §679, *supra*, and thereby perfect a term-time appeal, it is essential that the bond be approved by the court at the term at which the appeal is granted, or that the equivalent be accomplished by the court fixing the amount of the bond and naming and approving the sureties at such term, and by appellant filing the same in accordance with such order, within the time granted by the court and shown by the record. *Fort v. White* (1915), 58 Ind. App. 524, 108 N. E. 27; *Kyger v. Stallings* (1913), 55 Ind. App. 196, 103 N. E. 674; *W. C. Hall Milling Co. v. Hewes* (1914), 57 Ind. App. 381, 105 N. E. 241; *Coxe Bros. & Co. v. Foley* (1915), 58 Ind. App. 584, 107 N. E. 85; *Michigan Mut. Life Ins. Co. v. Frankel* (1898), 151 Ind. 534, 50 N. E. 304; *Tuttle v. Fowler* (1915), 183 Ind. 99, 107 N. E. 674; *Rohrbaugh v. Lease, Admr.* (1917), 63 Ind. App. 544, 114 N. E. 762.

Appellees contend that appellant did not file its appeal bond during the term at which the appeal was granted, and that the court did not, at such term, approve the surety on the appeal bond subsequently filed by it, and hence it failed to perfect its appeal.

Appellant does not claim to have filed its appeal bond during the term at which the appeal was granted, but contends that it filed its motion for a new trial in due time; that at the time the court overruled its said motion it prayed an appeal, which was duly granted, and the court fixed the amount of the appeal bond and named the surety thereon, which it in effect approved; that thereafter, within the time given therefor, it filed its appeal bond in conformity with the order of the court, and thereby perfected its appeal.

It will be observed that the order-book entry in question does not formally recite that the court approved the surety named therein. Appellant claims that this is unnecessary, as such approval is clearly implied from the fact that the court granted the appeal prayed upon the filing of an appeal bond, within thirty days from that date, in a specified sum, with a designated surety thereon.

We would agree with this contention, if it were not for the concluding clause of the order-book entry which reads, "subject to the approval of the court," but the use of this clause clearly precludes an inference of approval.

Appellant seeks to avoid the effect of this concluding cause by asserting that it should be regarded as mere surplusage, or considered as merely reserving to the court the right thereafter to inspect the bond filed by it, to see that it measures up to the court's requirements as to penalty and surety, and was in the form provided by law.

It is an elementary rule of construction that every clause and every word of a written instrument should,

when possible, have assigned to it some meaning, and a harmonious whole be made to appear, as it will not be presumed that they were inserted for a mere idle purpose. This rule has often been applied to the construction of contracts. *Irwin v. Kilburn* (1885), 104 Ind. 113, 3 N. E. 650; *Warrum v. White* (1909), 171 Ind. 574, 86 N. E. 959; *Nave v. Powell* (1913), 52 Ind. App. 496, 96 N. E. 395; *Kann v. Brooks* (1913), 54 Ind. App. 625, 101 N. E. 513. But it is equally as applicable to any other document or instrument in writing requiring a construction. Under this rule, we cannot treat said concluding clause as mere surplusage, but must endeavor to ascertain the meaning the court intended to express thereby, and give it effect.

Appellant concedes that the court, by the use of the clause in question, made a reservation to itself, but asserts that the scope of the same should

4-6. be limited by the construction indicated above.

On the other hand, appellees contend that the reservation should not be so limited, as the language used clearly indicates an intention to withhold a present approval of the surety named. A consideration of these opposing contentions has led us to conclude that, if we adopt the former, we must read into the order-book entry something that the language neither expressly states nor reasonably implies, while an acceptance of the latter only requires that we ascribe to the language used its ordinary meaning. Moreover, the court is not required to supervise the filing of an appeal bond, as that has been held to be a purely ministerial act. Section 679, *supra*, provides what the bond shall contain, and §1278 Burns 1914, §1221 R. S. 1881, cures its defects in form, substance,

recital or condition. In view of these facts, it is not reasonable to presume that the court appended the concluding clause in question merely as a means of affording it an opportunity to see that the bond was formal when it was filed. In fact, when the trial court, during the term in which a judgment is rendered, fixes the amount of the appeal bond, names and approves the surety, and designates a time in which it may be filed, its duty with reference thereto is at an end. If the party seeking the appeal files his bond in conformity with the statute and such order, he may prosecute the same as a term-time appeal; and otherwise not, as the court is without authority to enlarge or limit his rights in that regard, so long as such order stands. For the reasons stated, the record fails to show that the court approved the surety named during the term at which the motion for a new trial was overruled, which must be taken as the final judgment within the meaning of the statute governing appeals, where, as here, the entry of the judgment precedes the ruling on such motion. *Pittsburgh, etc., R. Co. v. Johnson* (1911), 49 Ind. App. 126, 93 N. E. 683, 95 N. E. 610; *Rohrbaugh v. Lease, Admr., supra*. Appellant in support of its contention cites and relies in part on the case of *Penn, etc., Plate Glass Co. v. Poling* (1913), 52 Ind. App. 492, 100 N. E. 83. In that case the court cited with approval a quotation from the case of *Ashley v. Henderson* (1904), 32 Ind. App. 242, 69 N. E. 469, wherein an attempt was made to state the steps necessary to perfect a term-time appeal. In this statement language is used that would indicate that an appeal bond, filed after the term at which the judgment was rendered, must be approved by the court, and from

which it might be inferred that such approval would cure a failure to approve the surety during such term. In this particular, such statement was evidently not duly considered and to that extent must be disapproved, as it is firmly settled by repeated decisions of this and the Supreme Court that the bond must be filed and approved during the term at which the judgment is rendered, or the surety must be named and approved during such term, and the bond filed within the time given by the court for that purpose.

As the bond in this case was not filed and approved during the term at which judgment was rendered, and the surety named was not approved during

7. such term, but its approval was made to depend on the future action of the court which did not occur until a subsequent term, appellant has failed to perfect a term-time appeal. No attempt has been made to perfect the same as a vacation appeal, and appellees have not joined in error. It follows that the motion to dismiss the appeal must be sustained for want of jurisdiction.

The conclusion we have reached renders it unnecessary to consider appellee's second ground for dismissing the appeal. However, it is proper to say that the objections there urged would not require a dismissal of the appeal, in view of §1 of the act of 1917 relating to civil procedure. Acts 1917 p. 523, §691a *et seq.* Burns' Supp. 1918.

For the reasons stated, appellee's motion is sustained, and the appeal is dismissed.

NEW YORK CENTRAL RAILROAD COMPANY v. REIDENBACH.

[No. 10,047. Filed November 21, 1919.]

1. **NEW TRIAL.—Interrogatories to Jury.—Untrue Answers.—Not "Misconduct of Jury."**—An allegation in a motion for new trial that a jury made incorrect or untrue answers to certain interrogatories returned with the general verdict, will not constitute a charge of misconduct of the jury within the meaning of the statute authorizing new trials upon such ground. p. 393.
2. **DAMAGES.—Threshing Machine.—Loss of Use.**—In an action against a railroad for damage to a separator at a crossing, the fair rental value of the machine was a proper element of damages, where it was damaged in threshing season, and there was evidence of the number of days' work ahead of it and of the fair rental value per day. p. 393.
3. **EVIDENCE.—Circumstances.—Consideration.**—It is the duty as well as the right of the jury, in rendering a verdict and in answering interrogatories, to take into consideration not only the testimony of the witnesses but also the facts and circumstances proved by the evidence and that surround the case, together with reasonable inferences that can be drawn therefrom. p. 394.
4. **RAILROADS.—Accidents at Crossings.—Contributory Negligence.—Evidence.**—Where there was evidence that a railroad crossing was too narrow to permit the passage of a separator, and that the stalling of the separator on the track was not due to the condition of the lugs on its drive wheels, the jury was justified in finding the plaintiff not guilty of contributory negligence in stalling upon the track. p. 394.
5. **RAILROADS.—Accidents at Crossings.—Negligence.—Evidence.**—Evidence held to justify a finding that the employes in charge of the approaching train negligently failed to observe the obstruction of the crossing by plaintiff's separator being stalled thereon, and to stop the train in time to prevent the injury. p. 395.
6. **TRIAL.—Instructions.—Omissions.—When Element Not in Case.—Covered by Instructions Given.**—An instruction given in an action for damages to a separator at a railroad crossing which omits the element of contributory negligence is not harmful where under the evidence the plaintiff was not guilty of contributory negligence, and where by another instruction the jury was fully instructed as to that element. p. 396.

New York Central R. Co. v. Reidenbach—71 Ind. App. 390.

7. **TRIAL.—Damages.—General Instruction.—Duty to Tender Instruction More Specific.**—Appellant cannot complain of a correct instruction on damages, on the ground that it is too general, having failed to tender a correct instruction that was more specific. p. 396.
8. **APPEAL.—Admission of Evidence.—Harmless Error.—Railroads. Crossing Accidents.**—In an action for damages to a separator struck by a train while stalled at a crossing, defendant could not be harmed by permitting plaintiff to show the amount of travel on the road involved. p. 396.

From DeKalb Circuit Court; *Dan M. Link*, Judge.

Action by William Reidenbach against the New York Central Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Walter Olds, W. H. Shannen and Bertrand Walker, for appellant.

Spangler & Nobles and Mountz & Brinkerhoff, for appellee.

NICHOLS, P. J.—This action by appellee against appellant is for damages alleged to have occurred by reason of a grain separator belonging to appellee being struck by one of appellant's trains.

The amended complaint is in two paragraphs. In the first paragraph it is alleged that the right of way of appellant crossed at right angles a public road in Noble county, Indiana, being the county in which the accident occurred; that it was the duty of appellant to maintain the approach of the public road to and across its right of way in a safe condition and of such grade as to enable the public to cross the right of way, but that appellant carelessly and negligently failed so to maintain the crossing, and that it permitted the rails of its track to so extend above the planks to such an extent that the wheels of vehicles in cross-

ing would strike the rails. This condition caused appellee's grain separator to become stalled on the track, and it was struck by a westbound train of appellant and damaged.

The second paragraph of the amended complaint is similar to the first paragraph, but has the additional averments that, while such separator was thus stalled upon said crossing, one of appellant's westbound trains approached at a high rate of speed, and at said time the separator was in view and in sight of the persons operating the locomotive which was drawing the train continuously from the time that the train was at a point two miles east of said crossing until it reached said crossing, and that the engineer in charge of said engine, by the exercise of ordinary care, could and would have seen the obstruction of said crossing and danger of a collision between said engine and said grain separator; that in the exercise of reasonable care the said engine and train could have been stopped by said engineer after it came in sight of said crossing and separator without colliding therewith, but the employes in charge of such train carelessly and negligently failed to stop said train, and failed to observe the obstruction of said crossing by said grain separator, and carelessly and negligently ran said engine and train against said separator, breaking, damaging, and destroying it. At the time of the injury and damage, appellee was engaged in operating the separator, it being the season of the year in which threshing was done, and that by reason of the damage and injury to said separator it was impossible for the plaintiff to continue and carry on his business of threshing except by hiring another machine at great expense. There was a demand for

\$2,000 damages. An answer of general denial put the case at issue, and it was submitted to the jury for trial, which returned a verdict in favor of appellee in the sum of \$700, together with answers to 105 interrogatories. After motion for a new trial, which was overruled, this appeal.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. Appellant, in discussing this error, contends as a

1. proposition of law that where a jury answers interrogatories contrary to the oral testimony, and there are no other visible facts connected with the case which would support the answers, it is guilty of such misconduct as will work a reversal of the judgment. To sustain this proposition appellant cites *M. O'Conner & Co. v. Gillaspy* (1908), 170 Ind. 428, 83 N. E. 738, from which case we quote from page 437 as follows: "An allegation in a motion for a new trial that the jury made incorrect or untrue answers to certain interrogatories returned with their general verdict will not constitute a charge of 'misconduct of the jury,' within the meaning of §585 Burns 1908, * * *." We do not deem it necessary to make any further comment.

The next error presented by the motion for a new trial is that of excessive damages. There is evidence that the separator was worth \$700 before the

2. accident, and that afterward it was worth \$100.

The jury was authorized to accept this evidence as a basis of estimating the damages to the separator, though there was some contradictory evidence. The complaint avers an element of special damages in the loss of the use of the machine at the time when it was in season for threshing, and by the

appellee's testimony a fair rental value of the machine was \$7 per day, and there were twenty-nine days' work yet to be done with this thrasher. This was a proper element of damage. *Shelbyville, etc., R. Co. v. Lewark* (1853), 4 Ind. 471; *City of Terre Haute v. Hudnut* (1887), 112 Ind. 542, 13 N. E. 686. The damages were not excessive.

The next error presented is that the evidence is not sufficient to sustain the verdict. In discussing this alleged error, it must be kept in mind that

3. it is a duty, as well as a right, of the jury in rendering its verdict and answering interrogatories to take into consideration not only the
4. testimony of the witnesses but also the facts and circumstances proved by the evidence and

that surround the case, together with reasonable inferences that can be drawn therefrom. It appears by the evidence, as well as by the answers to interrogatories, that the crossing which was involved in this accident was not wide enough to permit the passage of the separator. While there is some contradiction as to the width of the crossing and of the approaches thereto, after examining the photographs that are made a part of the record, and in view of the finding by the jury that the cause of the separator getting stalled upon the railroad tracks, and the engine drive wheels slipping on the rail, was not because of the lugs or grouters of the drive wheels being worn off, the jury was justified in its finding by its general verdict that the appellee was not guilty of negligence in stalling upon the track. Certainly there is no evidence of contributory negligence thereafter, for appellee was diligent in his efforts to remove the separator from the track, and in his efforts

to stop the train before the damage was sustained.

The second paragraph of the complaint does not present the doctrine of last clear chance, nor of wilful injury upon the part of appellant's serv-

5. ants. By its allegations it presents a case of simple negligence. We have already held that appellee was not guilty of negligence in permitting his separator to be stalled upon the track, or in failing to remove it before it was damaged. The question then is whether the appellant's servants were negligent, as averred in the second paragraph of the complaint, and, if so, did such negligence result in the injury complained of, which was the basis of this action? It appears by the evidence that the track from the crossing to the east, being the direction from which the train was approaching, was straight for a distance of three miles. In the record appears a photograph taken with a camera located about two miles to the east of the crossing, showing a straight track with an automobile standing over the crossing involved. The engineer himself testified that he saw the separator on the crossing three-quarters of a mile away, and that he could see a dark object there when he was a mile and a half away. He further testified that he could make a service stop in three-quarters of a mile, by which we understand a stop without the application of the emergency brakes. As he approached this crossing, the servant of appellee went down the track 500 feet, swinging a lantern and waving a red handkerchief across the track. There is some dispute in the evidence as to the time when the emergency brakes were applied, but one witness testified that he saw the train approaching, and that such brakes were applied at about 250 feet of the crossing.

The engineer says that he did not see the party who attempted to flag his train. From the foregoing evidence, the court holds that the jury was justified in finding, by its general verdict, that the employes in charge of the approaching train carelessly and negligently failed to observe the obstruction of the crossing and to stop the train in time to prevent the injury. The evidence is sufficient to sustain the verdict.

Appellant next complains of the giving of appellee's instruction No. 3, for the reason that there is omitted therefrom the element of contributory 6-8. negligence. Under the evidence in this case as aforesaid, the appellee was not guilty of contributory negligence. Further, by appellant's instruction No. 3, which was given, the jury was fully instructed with reference to the contributory negligence of the appellee. Instruction No. 4 was a correct statement of the law with reference to the damages sustained by appellee, though it might well have been more specific as to the elements of damage. Appellant, having failed to tender a correct instruction that was more specific, may not complain. The refusal of the court to give other instructions tendered by appellant is complained of, but, after reading such instructions, we deem it sufficient to say that they were properly refused, without extending this opinion by a discussion of them. Appellant could not have been harmed because appellee was permitted to show the amount of travel on the road involved. It was proper to show the value per day of the use of such a separator as here involved as one of the elements of appellee's damages.

The judgment is affirmed.

GRAND TRUNK AND WESTERN RAILROAD v. GLINSKI.

[No. 10,092. Filed November 21, 1919.]

1. TRIAL.—*Instructions.—Covered Requests Properly Refused.*—It was proper to refuse requested instructions fully covered by instructions given. p. 398.
2. APPEAL.—*Instructions.—Evidence.—Burden on Appeal.*—When an appellant claims that an instruction should have been given, it has the burden of showing that it is applicable to the evidence. p. 399.
3. APPEAL.—*Instructions.—Briefs.—Presumptions.*—Where appellant by his brief fails to set out in his statement of the evidence written instruments upon whose contents depend the correctness of rulings refusing and giving instructions, no error is shown, as the presumption is that the action of the court was correct. p. 399.
4. APPEAL.—*Carriers.—Instructions.—Bill of Lading.—Delivery.*—Where, in an action for negligent loss of goods by carrier, the evidence was such as to make it a question of fact whether the goods had been delivered to the plaintiff, it was error for the court to instruct the jury as matter of law that the carrier was bound to care for and guard such goods for a certain period after their arrival, under the provisions of the bill of lading, and without reference to whether such goods had been delivered. p. 400.
5. CARRIERS.—*Lost Goods.—Evidence of Delivery.—Question of Fact.*—Where the plaintiff in an action for negligent loss of goods rode in the car with his goods and horses to destination, and there signed the bill of lading and accepted the expense bill, and unloaded his horses, wagon and harness, leaving the lost goods in the car on the unloading track, and where the evidence is conflicting as to whether anything was said between him and the agent of the carrier on the subject of leaving the balance of the property in the care of the company, the question as to whether the property had been delivered to plaintiff was a question of fact for the jury. p. 400.

From LaPorte Circuit Court; *James F. Gallaher*, Judge.

Grand Trunk, etc., Railroad v. Glinski—71 Ind. App. 397.

Action by Martin R. Glinski against the Grand Trunk and Western Railroad. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Andrew J. Hickey and *Norman F. Wolfe*, for appellant.

Ellsworth E. Weir, for appellee.

McMAHAN, J.—This is an action by appellee against appellant to recover damages for personal property alleged to have been stolen while in appellant's possession. There was a trial by jury, a general verdict for appellee with answers to interrogatories, and a judgment upon the verdict for appellee.

The only error assigned is the overruling of appellant's motion for a new trial. The complaint is in two paragraphs. The first alleges that appellee delivered to appellant at Griffith, Indiana, certain household goods and horses for shipment to Crumstown, Indiana, and that appellant failed and neglected to deliver the same to appellee at Crumstown or any other place. The second paragraph contains the same allegations as the first, and also alleges that after the car in which the goods were shipped had arrived at Crumstown, and had been placed on appellant's track for the purpose of being unloaded, appellant failed and neglected to properly guard, protect, care for, and to look after said car, and that the car was entered by some person unknown, and said property taken therefrom and wholly lost to appellee.

Appellant contends that the court erred in

1. refusing to give instructions Nos. 1, 2, 3 and 4 tendered by it. Numbers 1 and 4 as tendered are fully covered by Nos. 2 and 3 given by the court. Instructions Nos. 2 and 3 tendered were in reference

to the construction to be given to the bill of lading and live-stock contract under which the property was shipped.

When an appellant claims that an instruction should have been given, it has the burden of showing that it is applicable to the evidence. The ap-

2-3. pellant contends that the court erred in refusing to give these two instructions, the correctness of which depends wholly upon the contents of certain written instruments, which appellant has failed to set out in the statement of the evidence. No error is therefore shown in the refusal to give these instructions. For a like reason we hold that there was no error in the fourth instruction given, wherein the court instructed the jury as to the effect of this instrument, and told them that it had no effect on the liability of the appellant for the loss of the goods mentioned in the complaint. In the absence of a showing to the contrary, we must presume this instruction is correct.

Complaint is also made of the eighth instruction given by the court on its own motion. This instruction informed the jury that under the bill of lading the appellee was entitled to forty-eight hours after notice of the arrival of the goods to unload them, and that during that period the goods were in the car at the risk of appellant, and that it was the appellant's duty to properly care for and guard such goods during that time; that a failure to properly protect such goods would be negligence on its part, for which it would be liable.

The appellee testified that he rode in the car with the property from Griffith to Crumstown, and after reaching Crumstown he went to appellant's agent and

told him he wanted to unload the horses, wagon and harness, but would leave all of the other goods in the car until he got a room in the house at the farm; that he signed a bill of lading, and the agent gave him the expense bill, and that nothing more was said by either appellee or the agent; that he unloaded the horses, wagon and harness, closed the door, and told appellant's agent that he was leaving the balance of the property in the care of the company; that he went away and did not return until two days later, and found part of the goods missing.

Appellant's agent at Crumstown testified that the car containing appellee's goods was placed on the unloading track; that appellee came to the office of the appellant after the arrival of the car and signed a receipt, after which appellee unloaded the horses; that appellee did not say anything to him about leaving the goods in the car.

The question as to whether the property had been delivered to appellee was a question of fact for the jury. If the goods were delivered to appellee,

4-5. appellant's liability was at an end. If there was no delivery of the goods left in the car, then appellant's liability had not ended. Instruction No. 8 informed the jury that, as a matter of law, appellant was in duty bound to care for and guard such goods for a period of forty-eight hours after their arrival without any reference to whether the goods had been delivered or not. This instruction would have been correct if it had been limited to the theory that there had not been a delivery of the goods, but in the form given it was error for which judgment must be reversed.

Judgment reversed, with instructions to sustain the motion for a new trial.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.—71 Ind. App. 401.

J. P. SMITH SHOE COMPANY v. CURME-FELTMAN SHOE
COMPANY.

[No. 9,458. Filed January 11, 1918. Rehearing denied June 28, 1918. Transfer denied November 21, 1919.]

1. **SALES.—Actions for Breach of Contract.—Measure of Damages.**—Ordinarily, the amount recoverable upon breach of an executory contract of sale by failure to deliver the articles bargained for, of the kind, quality or quantity designated, at the time and place for delivery, is the difference between the contract price and the market value at the time and place for delivery. p. 419.
2. **SALES.—Actions for Breach of Contract.—Damages.—Profits.**—Generally, the consideration of future profits, upon the question of damages for the breach of an executory contract of sale by failure to deliver, is excluded, because such profits are uncertain of realization, are contingent upon things collateral to the contract, and cannot be said to have been within the contemplation of the parties when the contract was made. p. 422.
3. **SALES.—Actions for Breach of Contract.—Damages.—Profits.—When Admissible.**—Where future profits may be ascertained with reasonable certainty and the loss of them is a proximate result of a breach of a contract of sale by failure to deliver, or where the facts show with reasonable certainty that such future profits were contemplated by the parties when the contract was entered into, they may properly be considered in estimating the damages. p. 422.
4. **SALES.—Actions for Breach of Contract.—Damages.—Profits.—Measure of Damages.**—While, in some cases, the amount of future profits lost by failure to deliver goods under a contract of sale may afford the most satisfactory means of ascertaining the actual damages occasioned by such breach, such profits are not to be taken for the measure of damages, but are only to be considered in connection with the other evidence on the question in estimating the damages that naturally and proximately resulted from the breach of contract. p. 422.
5. **SALES.—Action for Breach of Contract.—Damages.—Profits.—Correctness of Award.**—Where, upon breach of an executory contract of sale by failure to deliver, it happens that the actual damages sustained do not substantially differ from the aggre-

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.—71 Ind. App. 401.

gate of lost profits, the amount awarded will not necessarily be erroneous or excessive because of such fact. p. 423.

6. **SALES.—Actions for Breach of Contract.—Goods Bought for Resale in Established Trade.—Profits.**—Where a vendor of shoes to be manufactured according to specifications knew that the buyer had an established trade on such shoes at certain prices, such knowledge supplied the reasonable certainty of profits requisite to their consideration as an element of damages for the breach of the contract of sale by failure to deliver. p. 428.
7. **SALES.—Actions for Breach of Contract.—Goods Unobtainable Elsewhere.—Measure of Damages.—Actual Loss.—Retail Price.**—Where the manufacturer broke a contract for the sale of shoes to a retailer at a time when there was no market at which, or dealer from whom, shoes of the particular brand, make and quality could be obtained, the actual loss was the measure of damages, and the price at which, in the due course of business, they could have been sold by the purchaser may be considered in assessing such damages. p. 435.
8. **SALES.—Implied Warranty.—Acceptance.—Caveat Emptor.—Action for Price.—Counterclaim.**—Under a contract for the manufacture and sale of shoes, to be different from other shoes manufactured by the seller, to have the buyer's name stamped thereon and to be of special design, pattern and grade for sale to customers acquainted with such shoes by previous purchases, all of which was known to both parties, there was an implied warranty that such shoes would be reasonably suited for such trade, and where there were defects therein that were not known to the buyer and would not have been ascertained by ordinary inspection, the buyer was not bound to return the shoes, but could keep them, and if sued for the purchase price set up his damages by way of counterclaim, since in such a case the principle of *caveat emptor* is not applicable. p. 436.
9. **TRIAL.—Findings of Fact and Conclusions of Law.—Sales.—Actions for Breach of Contract.—Damages.—Profits.—Conclusions of law** that do not show that gross retail profits, as such, were taken as the measure of damages, without due consideration of other facts that might materially affect the question of damages, and which, in an action for breach for failure to deliver goods under an executory contract of sale, are based upon findings of the actual value of the goods, as ordered, in the amount or equivalent of the retail price, and of other facts showing that the actual damage sustained was the difference between the value of the goods at the time and place for delivery and the contract price, are not erroneous, in view of the right of a vendee to hold his vendor liable for the increased cost of pro-

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- curing goods elsewhere in case of the failure to deliver articles ordered for a particular purpose known to the vendor. p. 437.
10. EVIDENCE.—*Sales.—Actions for Breach of Contract.—Evidence of Calls for Goods by Customers.*—Where, in an action on an executory contract for the sale of goods, for breach by failure to deliver, the lost profits of the buyer are proper for consideration on the question of damages, evidence that there was a demand for the goods ordered is admissible. p. 439.
11. APPEAL.—*Sales.—Actions on Breach of Contract.—Evidence.—Private Writings.—Res Gestae.*—It was error to exclude records kept by the vendor in the regular course of its business while engaged in manufacturing shoes, and showing all the details of the stock, manufacture and shipment thereof, for the non-delivery of part of the order for which, and for the delivery of others in a defective condition, the buyer has set up a counterclaim for damages, such records being part of the *res gestae* and competent evidence on the issue of defects in the shoes ascribed in the counterclaim to faulty manufacture. p. 439.
12. APPEAL.—*Error—Exclusion of Evidence.—Not Shown Harmless.—Presumption.*—Where, from the record, the Appellate Court is unable to say that an error was harmless in excluding evidence which related to a material issuable fact, found against the complaining party, such error is presumed to have been harmful. p. 441.

From Marion Superior Court (93,610); W. W. Thornton, Judge.

Action by the J. P. Smith Shoe Company against the Curme-Feltman Shoe Company, wherein defendant filed a counterclaim. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Clarence E. Weir, Charles P. Ritter, Charles W. Richards, J. J. Cermak and McEwin, Weissenbach & Schrimski, for appellant.

Leander J. Monks, John F. Robbins, Henry C. Starr, James P. Goodrich and Carl H. Weyl, for appellee.

FELT, J.—This suit was instituted by appellant to recover a balance due for shoes alleged to have been

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sold and delivered to appellee. There are two paragraphs of complaint. The first counts upon shoes sold and delivered. The second is substantially the same as the first, except it avers a parol contract for the purchase of certain shoes by appellee from appellant with certain modifications thereof during the period of its fulfillment.

The controverted issues arose upon appellees' counterclaim filed in two paragraphs. The counterclaim sought to recoup by way of damages (1) for defective shoes which were unsalable and were by reason thereof returned to appellant; (2) for shoes appellant failed to manufacture and deliver according to the contract of purchase; (3) loss on account of sales and replacements of defective shoes; (4) on account of loss occasioned by necessary sales of defective shoes below the regular retail price; (5) for loss occasioned by sales of mismated shoes and necessary replacements by appellee; (6) for loss on account of defective shoes unsold and still in possession of appellee at the time of the trial.

Upon request the court made a special finding of facts and stated its conclusions of law thereon, which were in favor of appellee, and awarded net damages in its favor on the counterclaim in the sum of \$1,021.93.

Appellant's motion for a new trial was overruled, and judgment was rendered on the conclusions of law for the aforesaid amount and costs of suit.

Appellant has assigned as error each of the several conclusions of law and the overruling of its motion for a new trial.

The finding of facts is very long. We therefore set out its substance, and such portions thereof as will

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enable us to apprehend and decide the questions presented by the briefs.

The findings show that appellant was, and for many years had been, a manufacturer of shoes, in the city of Chicago, which it sold to retail dealers; that appellee is a corporation engaged in the business of selling shoes at retail in its several stores located in the cities of Indianapolis, Richmond and Muncie, Indiana; that it has been engaged in such business continuously since March, 1911, during all of which time it had been a customer of appellant, and had purchased from it large quantities of both high shoes and Oxfords of the kinds and grades described in the complaint, which shoes it had sold to its customers, and had thereby built up an extensive trade in such shoes and created a demand for them among the customers of its several retail stores aforesaid, prior to and during the year 1913; that the shoes so purchased and used by appellee were bought on orders given to appellant's agent, W. O. Holloway, at appellee's store in the city of Indianapolis, Indiana, and were so sold to appellee to be resold by it in the usual course of retail trade to its customers of its several stores aforesaid, all of which was known to appellant at all times during the period covered by the transactions aforesaid up to and including the transactions in the fall of 1912 and subsequently thereto; that the agent of appellant called upon appellee on September 17 and November 22, 1912, to sell shoes on orders for future delivery; that appellant was then engaged in the construction of a new factory, and, fearing delay in the delivery of shoes purchased, appellee refused to place any orders therefor with appellant, except upon the condition that any shoes ordered should be

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manufactured and made ready for shipment to appellee before removal to the new factory aforesaid, to which condition appellant expressly agreed; that, in pursuance of such agreement, on September 17, 1912, appellee ordered from appellant 2,770 pairs of Oxford shoes to be shipped February 1, 1913, to its several stores as indicated; that on November 22, 1912, appellee bought through appellant's agent aforesaid 1,320 pairs of high shoes to be ready for shipment by February 15, 1913, and 846 pairs of high shoes known and designated as "tramp last"; that the purchase price of all of said shoes was made f. o. b. Chicago, as follows:

Oxfords \$2.75 per pair except 103 pairs, which were \$2.60 per pair.

High shoes, not tramp last, per pair: 25 pairs, \$3.25; 714 pairs, \$2.85; 578 pairs, \$3.35; 846 pairs, tramp last, \$2.85.

Appellee also bought from appellant certain other shoes designated "stock shoes," for which it agreed to pay the sum of \$465; that all the indebtedness due for shoes purchased as aforesaid has been paid, except the sum of \$3,283.27, which amount is due and unpaid, and is subject to all lawful amounts arising out of appellees' counterclaim filed herein; "that it was agreed by plaintiff and defendant, as a part of said orders and sales of shoes, that all shoes so ordered by defendant should be manufactured by plaintiff in special designs and patterns for defendant, different from all other shoes manufactured by plaintiff, and when so manufactured they should have the name of defendant stamped therein and thereon by plaintiff; and that all such shoes so manufactured

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under such orders were accordingly so made up in such special designs and patterns, and were so stamped with the name of defendant.

“That at the time of soliciting the orders for shoes by plaintiff from defendant, and on the agreement of plaintiff so to sell such shoes to defendant pursuant thereto, plaintiff knew and understood that said shoes were being purchased by defendant to be resold to its customers in the usual course of its retail trade at its three said several stores, and that there was at that time an extensive demand there for them among defendant’s customers, and that at the time of the giving of said orders by defendant, and of the agreement of plaintiff so to manufacture and sell said shoes to defendant, it was within the contemplation of the parties that said shoes should be sold by defendant at a retailer’s profit, as hereinafter set forth, at its said three places of business.” That appellee was at all times ready and willing to perform its part of said contracts of purchase, and has fully performed the same except as prevented by the failures or occasioned by the default of appellant in relation thereto.

Appellant failed and neglected to manufacture and ship to appellee said Oxford shoes by February 1, 1913, in accordance with its contract, though it could have done so, but it did make shipments thereunder as follows:

“To defendant at its said Indianapolis store:			
March 14, 1913.....	183	pairs	
“ 17, “	97	“	
“ 19, “	214	“	
“ 21, “	103	“	
“ 24, “	139	“	

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April	2,	“	199	“
“	7,	“	111	“
“	11,	“	85	“
“	18,	“	127	“
“	20,	“	124	“
May	13,	“	108	“

A total of.....1,490 pairs.

To the defendant at its Richmond store:

March	17,	1913.....	44	pairs
“	19,	“	125	“
“	21,	“	25	“
“	24,	“	20	“
April	2,	“	77	“
“	7,	“	33	“
“	11,	“	39	“
“	16,	“	114	“
“	21,	“	98	“
“	25,	“	71	“
“	29,	“	24	“
May	2,	“	75	“
“	13,	“	24	“
“	19,	“	33	“

A total of..... 802 pairs.

To defendant at its Muncie store:

March	17,	1913.....	101	pairs
“	19,	“	21	“
“	21,	“	52	“
April	2,	“	109	“
“	7,	“	62	“
“	11,	“	133	“

A total of..... 478 pairs.”

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(11) That, without any fault of appellee, appellant failed to manufacture and ship to it, or to have ready for shipment on call as per contract, by February 15, 1913, said 1,320 pairs of high shoes, not tramp last, though there was ample time to have done so; that appellee frequently demanded the delivery of said shoes according to contract, and after February 15, 1913, urged delivery thereof at its several stores aforesaid, but was only able to receive shipments as follows:

To defendant's said Indianapolis store:

March 21, 1913.....	2 pairs
“ 24, “	42 “
April 2, “	202 “
“ 7, “	57 “
“ 11, “	100 “
“ 18, “	14 “
“ 29, “	12 “

A total of..... 429 “

To defendant's Richmond store:

March 21, 1913.....	18 pairs
“ 24, “	66 “
April 2, “	72 “
“ 24, “	24 “
“ 25, “	24 “
“ 29, “	18 “

A total of..... 222 “

To defendant's Muncie store:

April 2, 1913.....	36 pairs
“ 7, “	18 “
“ 29, “	24 “

A total of..... 78 “

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That of the 1,320 pairs of shoes aforesaid appellant shipped to appellee only 729 pairs in the lots at the dates and places above indicated, and wholly failed to deliver to appellee 591 pairs thereof at any time or place, though appellee frequently demanded and urged shipment thereof; that on March 24 appellee was notified by appellant that said 591 pairs of shoes had not been manufactured and could not be manufactured and made ready for shipment before June 1, 1913, and asked if appellee desired to have them made for delivery at that time; that thereupon, owing to the delay and lateness of the proposed delivery, and the improbability of being able to sell the same, appellee directed the cancellation of that portion of the order, and the same were never delivered; that, if said 591 pairs of high shoes had been shipped to appellee according to contract, the cost of freight and drayage thereon would not have exceeded \$9; that the value of the aforesaid 2,770 pairs of Oxford shoes in the Spring and Summer of 1913, if manufactured and delivered in accordance with the contract therefor, at appellee's several places of business aforesaid, was \$4 per pair, or \$11,080; that there was a heavy demand for said shoes at the stores aforesaid, beginning in February and extending into the summer of 1913; that, if said shoes had been shipped by February 1, 1913, or within a reasonable time thereafter, appellee could and would have sold all of them at \$4 per pair.

(14) The finding sets out in detail facts to show that twenty pairs of Oxford shoes were mismated, and the fact was not known to appellant when the same were received, and that 350 pairs were so poor in quality of material and in workmanship as to be

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unsalable, and the same were returned to and received by appellant, and appellee was credited therefor on its account; that, if said 350 pairs of shoes had been of the quality and finish contracted for, appellee could and would have sold all of them for \$4 per pair during the Spring and Summer of 1913; that of the Oxford shoes aforesaid, 1,031 pairs were not properly dried and seasoned on the lasts, were defective, and when sold became unfit for wear in a few days; (15) that 160 pairs of such shoes were returned to appellee by customers, and, on account of such defects, appellee replaced them with other shoes of the value of \$4 per pair, without receiving any additional compensation therefor; that because of such defects, appellee was compelled to sell said shoes at a reduced price, below \$4, viz.:

125 pairs at.....	\$1.95 per pair
175 " "	1.45 " "
350 " "	1.00 " "

That, if the same had been delivered to appellee in good condition, it could have sold the 650 pairs aforesaid for \$4 per pair; that appellant was compelled to and did replace twenty pairs of mismated Oxford shoes aforesaid with other shoes of the value of \$4 per pair; (15) that appellee was unable to sell 221 pairs of said defective Oxford shoes, has them on hand, and they are of the value of fifty cents per pair, or \$110.50.

That, if said 1,320 pairs of high shoes so ordered as aforesaid had been delivered at the times specified, and had been of the designated grade and quality, 717 pairs thereof, at appellee's stores aforesaid, would have been of the value of \$4 per pair during the sea-

son of 1913, or \$2,868, and 603 pairs, under the same conditions, would have been of the value of \$5 per pair, or \$3,015, and appellee could and would have sold all of them for the prices aforesaid during the proper season of 1913.

(18) That of the 729 pairs of high shoes, and also the 591 pairs aforesaid, part were \$4 and part \$5 per pair at retail in appellee's stores; that of the 729 pairs aforesaid ninety pairs of those priced at \$4 and 100 pairs of those priced at \$5 were defective and ill fitting when delivered to appellee, and, because of such defective condition, during the season of 1913, appellee was compelled to and did sell fifty pairs of said \$4 shoes at \$2.95 per pair, which amount was the fair and reasonable value, also 100 pairs of said \$5 shoes at \$3.95 per pair, which was the fair and reasonable value thereof; (19) that of said ninety pairs appellee sold forty pairs at \$4 per pair, and, because of the defects aforesaid, all of them were returned to appellee in a few days after sale, in a wrinkled, out-of-shape condition, wholly unfit for use; that because thereof appellee was compelled to and did replace them with forty pairs of other shoes of the value of \$4 per pair, or \$160; (19) that five pairs of such shoes were mismated by appellant, without the knowledge of appellee, on account of which appellee was compelled to replace them to customers at a cost of \$20; that the shoes so returned were of no value whatever.

“That there was no market, or place known to or accessible to defendant, other than the factory of plaintiff, where it could obtain Oxford shoes or high shoes, not tramp last, in quantity, quality, kind, and in particular style and description like those ordered

by defendant from plaintiff on said respective dates of September 17, 1912, and November 22, 1912, at any time after the default and failure of plaintiff to comply with its agreement to manufacture and ship said Oxford shoes by February 1, 1913, or within a reasonable time thereafter; and to manufacture said high shoes, not tramp last, complete and ready for shipment by February 15, 1913, or within a reasonable time thereafter, and no such market where defendant could, at any time after such default and failure, obtain shoes of any kind to take the place of those so ordered from plaintiff that would meet the needs and demands of its retail trade in any of its several stores. That when it became known to defendant that plaintiff had failed so to manufacture and ship said Oxford shoes by February 1, 1913, defendant at once and on divers times thereafter communicated with plaintiff, and urged and requested plaintiff for shipments and deliveries of said shoes, and plaintiff in response made repeated promises of early shipments, which promises were relied on by defendant, but which were broken by plaintiff. That at divers times during said period of plaintiff's delays in shipments defendant requested plaintiff to make shipments to it of stock shoes to supply the place in its trade of those so ordered, but plaintiff failed and neglected to furnish and supply any of them, except to the amount and value of four hundred sixty-five and forty-hundredths dollars (\$465.40), as hereinabove stated.

“* * * That at all times after February 1, 1913, and during and throughout the season of the year, 1913, defendant kept and maintained proper and adequate storerooms, properly equipped, at its

said three several places of business, and a sufficient force of clerks and employes, superintendents and managers to handle, care for, transact and carry on its retail business therein, all of which plaintiff then and there knew, but the expense thereof was not added to nor increased, nor any of its overhead expenses increased or added to, by reason of the sales of shoes therein, so ordered and so shipped from plaintiff to defendant; and, if plaintiff had manufactured and shipped to defendant all shoes so ordered on September 17, 1912, and November 22, 1912, in accordance with the terms of said orders, and of defendant's calls for shipments of said high shoes, not tramp last, defendant would and could have cared for, handled and sold the same, in its several stores in the usual course of its retail trade, without being thereby put to any additional expense by reason thereof over and above the expenses that it would otherwise have incurred in conducting and carrying on its business at its three several stores and places of business."

The court also finds that all the shoes ordered by appellee as aforesaid, at the times of shipment designated in the contract, were of the value of the prices therein named, f. o. b. Chicago.

"That plaintiff manufactured for and sold the Oxford shoes to defendant, to be resold by it at four dollars (\$4.00) per pair at retail, it being plaintiff's intention and design that such shoes should be put on the retail market at that price; and plaintiff manufactured for and sold to defendant seven hundred seventeen (717) pairs of high shoes, not tramp last, to be resold by it at four dollars (\$4.00) per pair, and six hundred three (603) pairs at five dollars (\$5.00) per

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pair, it being plaintiff's intention and design that such shoes should be put on the retail market at those prices."

The court stated its conclusions of law on the foregoing facts as follows: "(1) That plaintiff is entitled to recover of and from defendant the unpaid balance of the purchase money for the shoes so sold and delivered to defendant the sum of three thousand two hundred eighty-three and twenty-seven hundredths dollars (\$3,283.27), subject to all indebtedness existing in favor of defendant from plaintiff by reason of the facts found and set forth in the above and foregoing finding of facts. (2) That defendant is entitled to recover of and from the plaintiff the sum of four hundred forty-two and fifty hundredths (\$442.50) dollars for and on account of its loss sustained on three hundred fifty-four (354) pairs of Oxford shoes, shipped and delivered to defendant in defective condition, and by reason thereof returned by defendant to plaintiff, as found and set out in finding fourteen (14) of the above and foregoing findings of the court. (3) That defendant is entitled to recover of and from the plaintiff the sum of six hundred and forty dollars (\$640.00) on account of its loss sustained in the sale and replacement of one hundred sixty (160) pairs of Oxford shoes, as found and set forth in finding fifteen (15) of the foregoing findings of the court. (4) That defendant is entitled to recover of and from the plaintiff the sum of seventeen hundred fifty-two and fifty-hundredths dollars (\$1,752.50) on account of its loss sustained in the sales below price of six hundred fifty (650) pairs of Oxford shoes, as found and set forth in finding 15 of the above and foregoing findings of the court. (5) That defendant is entitled to recover

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of and from the plaintiff the sum of \$80.00 on account of its loss sustained in the sales and replacements of 80 pairs of mismated Oxford shoes, as found and set forth in finding 15 of the above and foregoing findings of the court. (6) That defendant is entitled to recover of and from the plaintiff the sum of \$773.50 on account of its loss sustained on 221 pairs of defective Oxford shoes shipped and delivered to defendant, as found and set forth in finding 15 of the above and foregoing findings of the court. (7) That defendant is entitled to recover of and from the plaintiff the sum of \$157.50 on account of its loss sustained on sales of 150 pairs of defective high shoes, not tramp last, as found and set out in finding 19 of the above and foregoing findings of the court. (8) That defendant is entitled to recover of and from the plaintiff the sum of \$160.00 on account of its loss sustained in sales and replacements of 40 pairs of defective high shoes, not tramp last, as found and set out in finding 19 of the above and foregoing findings of the court. (9) That defendant is entitled to recover of and from the plaintiff the sum of \$20.00 on account of its loss sustained on sales and replacement of 5 pairs of mismated high shoes, not tramp last, as found and set out in finding 19 of the above and foregoing findings of the court. (10) That defendant is entitled to recover of and from the plaintiff the sum of \$384.00; less freight and drayage, on account of its loss sustained by reason of the failure of plaintiff to manufacture, ship and deliver to defendant, at the proper time during the season of 1913, five hundred ninety-one pairs of high shoes, not tramp last, as found and set out in findings 11 and 18 of the above and foregoing findings of the court. That from

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this sum of \$384.00 plaintiff is entitled to have deducted the probable cost of freight and drayage on such shoes, if shipped, in the sum of \$9.00, leaving a net balance of \$375.00, which defendant is entitled to recover of and from plaintiff on account of this item. (11) That the defendant is entitled to recover of and from the plaintiff the aggregate of the above and foregoing items, as set out in the foregoing conclusions of law numbered respectively 2, 3, 4, 5, 6, 7, 8, 9, and 10, to wit, the sum of \$4,401.00. That from this sum plaintiff is entitled to have deducted the sum of \$3,283.27, being the unpaid balance of the purchase money for said shoes, and the further sum of \$95.80 paid out as freight, express and drayage charges on shipments of such shoes, leaving a net balance of \$1,021.93, which last-named sum defendant is entitled to recover of and from plaintiff, on the whole case, together with its costs of action."

Appellant contends that the trial court erred in each of said conclusions of law, except the first, because "it applied an erroneous rule of damages and allowed appellee, as a part of its damages, purely remote and speculative gross retail profits," and the facts found authorize no other or different conclusion; that the apparent effort in the findings to make the difference between the contract price of the shoes and the retail selling price identical with gross retail profits, and thereby bring the case under the general rule for the measure of damages in such cases, cannot change the fact that the court awarded appellee gross retail, indefinite, and speculative, profits; that denominating or calling gross retail profits by another name does not change their character or remove the indefiniteness and uncertainty on account

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of which the law excludes such profits as the measure of damages in cases like the one now under consideration; that the true measure of damages applicable to this case is the general rule which allows the vendee to recover as damages for failure of the vendor to deliver goods according to contract the difference between the contract price and the market value of such goods at the time and place stipulated for delivery and interest.

Appellee asserts that both the evidence and the facts found by the court show that the shoes in question were ordered by it to be manufactured in special designs and patterns by appellant, and to be delivered at stated times to appellee, to be sold at retail to its customers at its several stores; that there was default on the part of appellant in the general particulars found and stated by the court; that, as a direct result of such defaults and failures on the part of appellant, appellee was damaged "in loss of profits and in other respects as found and allowed by the court;" that the evidence shows and the court found as a fact "that it was within the contemplation of the parties to the contract that the shoes were to be resold by the appellee, in the usual course of retail trade;" that the court has found and stated the value of all the shoes purchased at the time they were to have been delivered under the contract at appellee's several stores, which under the law means market value; that under the facts so found the result is substantially the same whether the general rule of damages be applied for the failure of the vendor to deliver the articles sold at the designated time and place, and of the kind and quality specified in the contract, or whether the rule of special damages be invoked,

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which, on proper showing, permits the recovery of lost retail profits as damages.

The general rule for the measure of damages for the breach of an executory contract by the vendor,

by failure to deliver the articles bargained for,

1. of the kind, quality, or quantity designated, at the time and place appointed for delivery, ordinarily limits the recovery to such damages as naturally and proximately result from the failure or default complained of, or such as may reasonably be presumed to have been within the contemplation of both parties at the time the contract was made, as the probable result of a breach thereof.

The amount of damages recoverable in such cases is ordinarily the difference in amount between the contract price and the market value of the articles or property in question at the time and place appointed for delivery. *Connersville Wagon Co. v. McFarlan Carriage Co.* (1906), 166 Ind. 123, 135, 76 N. E. 294, 3 L. R. A. (N. S.) 709; *Acme Cycle Co. v. Clarke* (1901), 157 Ind. 271, 276, 61 N. E. 561; *Berkey & Gay Furn. Co. v. Hascall* (1890), 123 Ind. 502, 507, 24 N. E. 336, 8 L. R. A. 65; *Rahm v. Deig* (1889), 121 Ind. 283, 286, 23 N. E. 141; 2 Sutherland, Damages (4th ed.) §§651, 652-662; 8 R. C. L. 451-461; *Hadley v. Baxendale*, 5 Eng. Ruling Cases 502, 504, 9 Exch. 341, 356; *Talcott v. Freedman* (1907), 149 Mich. 577, 579, 113 N. W. 13.

Griffin v. Colver (1858), 16 N. Y. 489, 69 Am. Dec. 718, is a leading case on the subject under consideration. In that case the Court of Appeals, among other things, said: "It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and

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not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. * * * Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business, to constitute a safe criterion for an estimate of damages. * * * The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

“The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

“These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and

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yet, if in their nature uncertain, they must be rejected. * * * So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered * * *.”

Hadley v. Baxendale, supra, is a leading English case on the subject, and has frequently been cited with approval and followed by the courts of America. In that case it is said: “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.”

The rules for the measure of damages sustained on account of the breach of an executory contract for the sale of goods generally exclude considera-

2. tion of future profits, because they are uncertain of realization, and are contingent upon many things collateral to the contract of sale and cannot usually be said to have been within the contemplation of the parties when the contract was entered into.

But where such profits may be ascertained with reasonable certainty, and the loss of them is a proximate result of the breach of the contract of

3. sale, or where the facts show with reasonable certainty that such future profits were contemplated by the parties when the contract was entered into, they may properly be considered in estimating the damages sustained by reason of a breach of such contract.

While there is lack of uniformity in stating and applying the rules, it is generally held that prospective profits, as such, may not be made the basis

4. or measure of damages to be awarded for the breach of such contract, but may be proved and considered in estimating the actual damages sustained on account thereof. Where such profits may be ascertained with reasonable certainty, and their loss is the natural or proximate result of the breach complained of, or where it is reasonably certain from all the facts and circumstances of the case that prospective profits to be derived by the vendee were contemplated by both vendor and vendee, when the original contract of sale was made, the amount of such profits lost on account of the breach of the contract may afford the most satisfactory means of ascertain-

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ing the actual damages occasioned by such breach, though such lost profits are not accepted or considered as the measure of the damages to be awarded, but are only to be considered in connection with other evidence, which bears on the question, in estimating the damages that naturally and proximately resulted from the breach of the contract.

Without making such profits and actual measure of damages, it may happen in particular cases that the actual damages sustained may not differ

5. substantially in amount from the aggregate of such lost profits. The amount awarded will not necessarily be erroneous or excessive because of such fact, if on consideration of all the proved facts and circumstances relating to the question of damages, the amount so awarded gives only fair and reasonable compensation for the actual damages sustained as the proximate result of the breach of such contract. 8 R. C. L. §§63-66, pp. 503-506, and cases cited; *Connersville Wagon Co. v. McFarlan Carriage Co.*, *supra*, 130, 134, 136; *Acme Cycle Co. v. Clarke*, *supra*, 276, 278; *Berkey & Gay Furn. Co. v. Hascall*, *supra*, 508; *Rahm v. Deig*, *supra*, 286, 288; *City of Terre Haute v. Hudnut* (1887), 112 Ind. 542, 551, 559, 113 N. E. 686; *Jackson v. Stanfield* (1894), 137 Ind. 592, 616, 619, 620, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Simplex, etc., Appliance Co. v. Western, etc., Belting Co.* (1909), 173 Ind. 1, 10, 12, 88 N. E. 682; *Horace F. Wood Transfer Co. v. Shelton* (1913), 180 Ind. 273, 278, 101 N. E. 718; *City of Logansport v. Justice* (1881), 74 Ind. 378, 39 Am. Rep. 79; *Simmons v. Brown* (1858), 5 R. I. 299, 73 Am. Dec. 66, 69; *Goldston v. Wade* (1910), 123 N. Y. Supp. 114, 115; *Winston, etc., Machine Co. v. Wells-Whitehead To-*

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bacco Co. (1906), 141 N. C. 284, 53 S. E. 885, 8 L. R. A. (N. S.) 255, and notes; *Wallace v. Pennsylvania R. Co.* (1900), 195 Pa. 127, 45 Atl. 685, 52 L. R. A. 33; *Wells v. National Life Assn.* (1900), 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33, and notes; *Swain v. Schieffelin* (1892), 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385, 387, 389; *Anvil Mining Co. v. Humble* (1894), 153 U. S. 540, 14 Sup. Ct. 523, 38 L. Ed. 814, 817; *Cincinnati Gas Co. v. Western, etc., Co.* (1894), 152 U. S. 201, 14 Sup. Ct. 523, 38 L. Ed. 411, 413; *Emerson v. Pacific, etc., Packing Co.* (1905), 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 450, 113 Am. St. 603, 6 Ann. Cas. 973; *Johnson v. Miller* (1914), (Tex. Civ. App.) 163 S. W. 592, 594; *Enterprise Mfg. Co. v. Campbell* (1909), 121 S. W. 1040; *Dilley & Son v. Ratcliff* (1902), 29 Tex. Civ. App. 545, 69 S. W. 237, 238.

In *Simmons v. Brown*, *supra*, the Supreme Court of Rhode Island said: "In *Waters v. Towers*, 20 Eng. L. & Eq. 410, the action was for breach of contract for the nondelivery of certain machinery, within a reasonable time; and special damages were laid, that the plaintiffs had been prevented from completing their contract with a third person, whereby they had lost the profits which they would have made, had they completed it. Evidence as to this last contract was admitted, and of the advantage to the plaintiff from its performance. It was held, that the evidence as to the profits was properly admitted; and that the jury might assess damages to the amount of them, though they were not bound to do so; and the court said, if reasonable evidence is given that the amount of the profits would have been made, if the defendant had performed his contract, the damages may be as-

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essed accordingly; and this, though the second contract was one which could not have been enforced against the plaintiff, on the ground of the statute of frauds.

“These cases are all for breaches of contract. In the first two, the profits were not only allowed to be given in evidence, but are made the measure of damages. In the last, though the evidence was held to be properly admitted as the basis for estimating the damages, the profits were not held to be the measure of damages; and it was left to the jury, with this basis, to estimate them. There is nothing in the term ‘profits,’ that excludes their being given in evidence, more than any other item of damages; but proof of them is made to depend, like all other proof in relation to damages, upon the fact that the loss of them is the natural and direct result of the injury, and not a remote consequence; and the language of the court, in the last case, is significant: ‘that if reasonable proof be given that the plaintiff *would have made* the profits, that is, that those profits were the direct result of the performance by the defendant, and the loss the direct result of the breach, it was sufficient to warrant a recovery of them.’ ”

In the case of *United States v. Behan* (1884), 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, 170, the court said: “The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards

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performance less the value of materials on hand; secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary."

In *Howard v. Stillwell, etc., Mfg. Co.* (1891), 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, the court said: "The authorities both in the United States and England are agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy, in the facts, the

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adjudications of the courts in the different States are directly opposite. The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the nonfulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in the case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. * * *

But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States v. Behan*, 110 U. S. 338, 345, 346, 347 (28 : 168, 179-171); *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 454, 456 (31 : 479, 483); *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard*, 13 How. 307 (14 : 157)."

In *Wolcott, etc., Co. v. Mount* (1875), 38 N. J. Law 496, 500, 20 Am. Rep. 425, the court said: "The second question raised in the cause respects the measure of damages. The rule applied in the court below made the plaintiff whole, as he was allowed to recover

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the difference between the value of the crop produced and the crop which would have been produced if the seed had been answerable to the warranty. This embraces profits, and the contention was, that profits are too remote and uncertain to constitute an ingredient in the recompense which the law gives on a breach of contract.

“But this argument comprises a latitudinarian and incorrect statement of the legal rule. Profits sometimes are not, in a legal point of view, either remote or uncertain. Where the situation of the parties is such that, supposing their attention to have been directed to the contingency, they must have perceived, at the time of the making of the contract, that its breach would probably result in the loss of definite profits, such profits being of an ascertainable nature, the compensation which the law affords to the injured party will embrace these profits.”

In considering the question of future profits as an element of damages, where articles are purchased to be resold, the text-writers and courts have

6. generally recognized distinctions between cases where there were actual resale contracts made by the vendee and known to the vendor, and cases where there were no such existing contracts at the time of the original sale, or where the sales were made without reference to or knowledge of such resale contracts. Distinctions have also been recognized between sales to a person having an established business or trade, where purchases are made of articles suitable to such trade or established business with the knowledge of the vendor, and cases where articles have been purchased for resale in a prospective new business or enterprise having no established trade.

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In the latter instance it is held that profits are too uncertain, indefinite, and speculative to be considered as an element of damages, while in the former it has frequently been held that an established trade or going business may, with reasonable certainty afford the means of ascertaining future profits, and warrant their consideration, not as the measure of damages, but as a means of ascertaining the actual damages sustained in a given case. *Aetna Life Ins. Co. v. Nexsen* (1882), 84 Ind. 347, 355, 43 Am. Rep. 91; *Niagara Fire Ins. Co. v. Greene* (1881), 77 Ind. 590, 594; *City of Terre Haute v. Hudnut*, *supra*, 555, 556; *Montgomery County, etc., Society v. Harwood* (1891), 126 Ind. 440, 442, 26 N. E. 182, 10 L. R. A. 532; *Winston, etc., Machine Co. v. Wells-Whitehead Tobacco Co.*, *supra*, and notes; *Carpenter v. First Nat. Bank* (1887), 119 Ill. 352, 360, 10 N. E. 18; *Central Coal, etc., Co. v. Hartman* (1901), 111 Fed. 96, 49 C. C. A. 244, 246; *Lazier Gas Engine Co. v. DuBois* (1904), 130 Fed. 834, 65 C. C. A. 172, 176; *Border City Ice, etc., Co. v. Adams* (1901), 69 Ark. 219, 62 S. W. 591, 592; *Atchison, etc., R. Co. v. Thomas* (1904), 70 Kan. 409, 78 Pac. 861, 865; *Thorn v. Morgan, etc., Co.* (1903), 135 Mich. 51, 97 N. W. 43, 45; *Jordan, etc., Co. v. Patterson* (1896), 67 Conn. 473, 482, 35 Atl. 521; *H. G. Holloway & Bro. v. White, etc., Shoe Co.* (1906), 151 Fed. 216, 80 C. C. A. 586, 8 L. R. A. (N. S.) 704; 1 Sedgwick, Damages (9th ed.) §§182, 182a, 183.

In *Thorn v. Morgan, etc., Co.*, *supra*, the Supreme Court of Michigan said: "The first is the common measure of damages, where one can go into the market and procure the kind of goods contracted for, and is fully adequate compensation usually in such cases. Where this cannot be done, another measure of dam-

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ages is proper. It is shown in that case that many of these goods were ordered for the fall trade; that orders for garments had to be taken early, to give time for manufacture; and therefore that prompt delivery of samples and material for sample garments was indispensable. If, as claimed, the plaintiff knew and understood this, losses incurred by reason of non-delivery were recoverable, if the defendant could not have avoided such loss by purchasing goods elsewhere."

In *Montgomery County, etc., Society v. Harwood, supra*, our Supreme Court states that: "Profits are frequently taken into consideration in estimating and assessing the damages accruing by reason of the interruption or destruction of an established business, and proof in such case is admissible to show the amount of business done and profits realized prior to the interruption or stoppage of the business to enable the jury or court trying the case to arrive as nearly as possible at the actual damage sustained by the injured party. This affords some reasonable basis to reckon from, as, in case of an established business, it is reasonable to presume that, if pursued in the same manner, it will continue to yield a like profit."

In 8 R. C. L. 503, in discussing the extent of certainty required in assessing damages for the breach of an executory contract (§63), it is stated that: "While, as a general rule, no recovery can be had for loss of profits which are uncertain, contingent, conjectural, or speculative, it must be borne in mind that since profits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of con-

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tract cannot be deprived of all remedy. The general rule that absolute certainty is not required applies in this as in other respects. It is usually the right of the innocent party to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. No hard and fast rule for ascertaining the profits, for the loss of which a recovery may be had, can be laid down. Such profits must be determined according to the circumstances of each particular case, and the subject-matter of the contract. * * *

It has been said that four principal considerations have been recognized and applied, namely: first, how far the contract under consideration specifically provides for the award of damages for prevented gains upon its breach, or reasonably implies such an award as a necessary effect of a natural construction of its terms; second, the degree of certainty with which the harm can be traced to the wrongful conduct complained of as its legal cause; third, the extent to which the inherent difficulties and uncertainties of calculating the amount of prevented gains render the measure of damages speculative and untrustworthy; fourth, the possibility of applying to the controversy some more satisfactory standard of compensation. When profits are spoken of as not recoverable, reference is generally had to the profits of dependent and collateral engagements, or those contingent upon future bargains, speculations, or states of the market, and not the difference between the agreed price of something contracted for and its ascertainable value

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or cost. Profits sometimes are not, in a legal point of view, either remote or uncertain however, and in some cases are the best possible measure of damages, for the very reason that the loss is indisputable and the amount can be estimated with almost absolute certainty."

In *Blagen v. Thompson* (1893), 23 Ore. 239, 31 Pac. 647, 18 L. R. A. 315, the Supreme Court of Oregon states that: "Where one violates and entirely repudiates his contract with another, the damages sustained by the injured party are, as Earl, J., said, 'nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjecture and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing on account of such uncertainty any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain.' *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 209, 4 N. E. Rep. 264. The rule that damages which are uncertain or contingent cannot be recovered, does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the cer-

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tain result of the breach, and not to such as are the certain result but uncertain in amount.”

In *Hunt v. Oregon, etc., R. Co.* (1888), (C. C.) 36 Fed. 481, 1 L. R. A. 842, it is stated that: “The tendency of judicial decisions seems to be in favor of allowing a party to show, if he can, that he has suffered some damage by the breach of a contract, either in gains prevented or losses sustained, whenever such gains or losses directly relate to or arise out of the subject-matter of the contract, and not something collateral thereto.”

In 8 R. C. L. §62, p. 501, the author states that: “The earlier decisions both in England and in this country generally exclude profits altogether as an element of recoverable damages both in actions for breach of contract and in tort. But this rule, under more modern practice, has been generally abandoned in both classes of actions, and, as a result, the right to recover profits is now generally determined by the same rules as govern the recovery of other damages. It may therefore be said that lost profits are a proper element of damage when such loss is the direct and necessary result of the defendant’s acts, or where, * * * the loss of profits may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its violation, and where, in both classes of cases, such profits can be shown with a reasonable degree of certainty.” See, also, *Moulthrop v. Hyett* (1894), 105 Ala. 493, 17 South. 32, 53 Am. St. 139; *Guezkow Bros. Co. v. A. H. Andrews & Co.* (1896), 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, and notes; *Simmons v. Brown, supra*.

The finding of facts does not make a case of resale

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orders known to the vendor at the time of the original sale to appellee by appellant, but the facts do show that appellee had an established business, a part of which had been built up by the sale of the shoes made by appellant, of the particular brands and grades in controversy in this suit; that appellant knew of these facts and sold the shoes aforesaid to appellee for resale at its several stores where such trade had been so established; that there was an existing demand or inquiry for such shoes among the customers of appellee's stores prior to and during the season for which the shoes in controversy were purchased, amply sufficient to enable appellee to have sold all the shoes so purchased during such season for the established prices stated in the findings, had they been delivered according to contract and been of the grades and quality so purchased by appellee.

Appellant knew the facts aforesaid when the shoes were ordered. The shoes were bought before they were manufactured, and were to be of the style, brand and quality designated to meet the demands of the trade so established. They were sold by appellant, and bought by appellee, with full knowledge that they were to be resold to existing customers of appellee's stores who had already demonstrated their desire for and willingness to purchase such shoes at the established prices.

Under the authorities above cited, such established trade, known to the vendor, supplies the reasonable certainty of profits which the law makes requisite to a consideration of future profits as an element of damages for the breach of a contract of sale for future delivery of articles so manufactured and sold for such specific purpose or trade. *Edwards Mfg. Co. v.*

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Stoops (1913), 54 Ind. App. 361, 364, 102 N. E. 980, and cases cited; *Oil-Well Supply Co. v. Watson* (1907), 168 Ind. 603, 608, 610, 80 N. E. 157, 15 L. R. A. (N. S.) 868; *Connersville Wagon Co. v. McFarlan Carriage Co.*, *supra*, 131; *Pape v. Ferguson* (1902), 28 Ind. App. 298, 301, 62 N. E. 712; *Goldston v. Wade*, *supra*.

The findings also show that, at the time of appellant's default in the delivery of the shoes as afore-said, there was no market at which, or dealer

7. from whom, shoes of the particular brand, make and quality could be obtained. Where such conditions exist, the actual loss sustained is the measure of recoverable damages, and the price at which the shoes could have been sold by appellee in the due course of business may be considered in assessing such damages. *Berkey & Gay Furn. Co. v. Hascall*, *supra*; *Rahm v. Deig*, *supra*, 288; *Pape v. Ferguson*, *supra*, 305; *Vickery v. McCormick* (1889), 117 Ind. 594, 597, 20 N. E. 495; 2 Sutherland, Damages (4th ed.) §§662, 663, 664; 2 Sedgwick, Damages (9th ed.) §§734, 735, 735a, 735b; *Perry Tie, etc., Co. v. Reynolds* (1902), 100 Va. 264, 40 S. E. 919, 921. In *Jordan, etc., Co. v. Patterson*, *supra*, 481, 482, it is said: "The market value of any goods may be shown by actual sales in the way of ordinary business."

In *Pape v. Ferguson*, *supra*, 305, this court said: "There was evidence that this particular kind of lumber and logs had no particular market value, and witnesses were permitted to testify as to their actual value. The court states in the findings what the value was at the time and place of delivery. This, from the evidence, means actual value. The market price of a thing is no more than evidence of its value."

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See, also, *Jonas v. Noel* (1897), 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862; *Blair Co. v. Rose* (1901), 26 Ind. App. 487, 490, 60 N. E. 10; *Luedde v. Hooper* (1902), 95 Tex. 172, 66 S. W. 55, 56; *Allen v. Fox* (1873), 51 N. Y. 562, 10 Am. Rep. 641; 2 Sutherland, Damages §654, p. 2301.

Appellant also contends that the findings show that the defects found by the court were patent, and that by the acceptance of the shoes appellee waived

8. its right to any damages on account of such
• defects under the rule of *caveat emptor*. The findings show that the shoes were ordered to be manufactured; that they were to be different from other shoes made by appellant; that the name of appellee was to be stamped thereon, and the shoes were to be of a special design, pattern and grade, to be sold by appellee to existing customers who had become acquainted with such shoes by previous purchases; by reason thereof there was an established trade in, and demand for, such shoes, all of which was known to both appellant and appellee. Under such conditions, there is an implied warranty that the articles so manufactured and sold will be reasonably suitable for the purpose intended. Furthermore, the findings show that the defects were not known and would not have been ascertained by ordinary inspection when the shoes were received, most of the defects were of a character that were not readily observable, and did not become known until some of the shoes had been sold to and worn by customers. Considering the way in which the shoes were ordered, made, and delivered, the mode of shipment, and the opportunities of inspection when they were received, as shown by the findings, the principle invoked by appellant is not

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applicable, and appellee is not by the rule of *caveat emptor* precluded from recouping such damages as it may lawfully be entitled to recover for breach of the contract of sale. Under such a state of facts, appellee was not bound to return shoes, even if found defective in some particulars, but could keep them, and if sued for the purchase price, set up its claim for damages by way of counterclaim, if the shoes did not fill the requirements of such implied warranty. *Edwards Mfg. Co. v. Stoops*, *supra*, 365; *Zimmerman v. Druecker* (1896), 15 Ind. App. 512, 514, 44 N. E. 557; *Glucose Sugar, etc., Co. v. Climax Coffee, etc., Co.* (1907), 40 Ind. App. 182, 184, 81 N. E. 589; *Oil-Well Supply Co. v. Watson*, *supra*, 608, 610.

Appellant also contends that the conclusions of law are erroneous because they allow gross retail profits, which were not contemplated by the parties

9. when the sales were made to appellee. As already stated, the findings show that the shoes were of a special design, and ordered to be resold at retail, at certain prices, all of which was known to appellant. The court also finds that the parties contemplated such resale at the retailer's profit, and found the value of the shoes at the time and place appointed for delivery to be the amount of the retail price of such shoes, when of the grade, brand, and quality so purchased by appellee. *Perry Tie, etc., Co. v. Reynolds*, *supra*; *Booth v. Spuyten, etc., Mill Co.* (1875), 60 N. Y. 487. The findings also show that appellee's overhead expenses were not changed by the failure of appellant to deliver the shoes purchased according to contract, and that all the shoes ordered could have been sold at the regular retail prices without any additional expense to appellee. The fact that

the parties contemplated such retail profits is supported by appellant's previous dealings with appellee, by its knowledge of the trade built up on sales of the particular brand and make of shoes ordered by appellee, and its knowledge that appellees' business was that of a retail dealer of shoes at its several stores maintained for that purpose. The conclusions do not show that gross retail profits, as such, were taken as the measure of appellee's damages, without due consideration of other facts that might materially affect the question of damages.

Where articles are ordered for a particular purpose, and not delivered according to contract, if such purpose is known to the vendor, the vendee may procure them elsewhere if he can do so, even at a higher price, if necessary to secure them, and hold the vendor liable for the increased cost. 2 Sutherland, Damages (4th ed.) §662, p. 2339 *et seq.* In the case at bar the court finds the actual value of the shoes, as ordered, to be the amount or equivalent of the retail price, and by other facts shows that the actual damage sustained by appellant's default is the difference between the value of the shoes at the time and place appointed for delivery, and the contract price, subject to certain minor considerations as indicated in the findings. On the facts so found, the conclusions of law are not erroneous under the law as above announced.

It is also contended that the court erred in overruling appellant's motion for a new trial.

It is urged that the damages are excessive, because the evidence shows that they include gross retail profits. This question has been considered in our discussion of the conclusions of law, and decided adversely to appellant's contention.

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It is also contended that the court erred in permitting evidence to the effect that there was a demand for the shoes ordered by appellee, and that

10. such evidence should have been excluded on appellant's objection that it was speculative and too remote to be considered in estimating damages to be assessed against appellant. Under the issues, the inquiry or demand for the shoes in controversy was an important subject for consideration, and was a material issuable fact to be proved or disproved. The question was not subject to the objections urged, and the court did not err in overruling the objection thereto.

Appellant also contends that the court erred in excluding from the evidence certain exhibits consisting

11. of certain records kept by appellant in the regular course of its business while engaged in manufacturing the shoes ordered by appellee. The exhibits offered were identified by the witness Martha Carlson, who testified that the records were made by her or by persons under her direction and supervision as foreman of that department, and were made as the work progressed from temporary memoranda furnished by the workmen engaged in the manufacture of said shoes, and showed, among other things, the length of time the shoes in controversy were kept on the lasts before being removed for shipment to appellee. The witness also testified that such exhibits were the only records in existence of the facts shown therein by which a complete record was kept of the date work was begun, names of shoes, style, sizes, width, date "lasted," "last pulled," date "shipped," and numerous other facts constituting a complete record of all the details of stock, workman-

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ship, finished product, shipment and identification of the shoes in controversy. She also testified that she had no personal recollection of the facts shown by such records.

Appellee objected on the ground that the exhibits were self-serving declarations of appellant, made in the absence of appellee; that they were not part of the *res gestae* of any transaction between the parties, and were hearsay, secondary evidence, wholly irrelevant and immaterial to any issue in the case.

The appellee alleged in its counterclaim "that each and every pair of shoes had been taken from the lasts too soon and while the shoes were yet too green and by reason thereof would not wear well or hold their shape and were practically valueless." Appellee offered evidence tending to support such allegation, and the trial court found the facts to be substantially as alleged. Appellant proved by a competent witness that in the manufacture of such shoes five days was a sufficient length of time for them to remain on the lasts to secure good results. It offered to show by the excluded exhibits that the shoes in controversy remained on the lasts from seven to ten days.

This was material evidence. The records were sufficiently identified, and were shown to have been duly kept by competent persons employed by appellant for that purpose in the regular course of the business of manufacturing shoes, for the purpose of preserving a detailed record of the dates on which the work was begun, different portions of the work done, and when the manufacturing process was completed, and all the facts connected therewith and necessary to the complete identification of the stock, process of manufacture, and the finished product of the factory. The

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shoes were ordered by appellee to be manufactured. The records excluded purported to be the records kept in the due course of the business of manufacturing the particular shoes in controversy. They were shown to have been made from day to day as the work progressed from temporary memoranda furnished by the workmen and from data obtained in the regular and usual course of business in appellant's factory. The records were therefore connected with the transactions of the manufacture and shipment of the shoes in controversy. Both appellant and appellee were connected with such transactions, and the records excluded are a part of the *res gestae* thereof, and competent evidence to be received and considered in deciding the issue of defects in the shoes presented by appellee's counterclaim.

The question presented has been considered and passed upon by this court in several cases so recently that extended discussion can serve no useful purpose. The facts of this case bring it within the rule of records duly kept in the regular course of business. The trial court therefore erred in excluding the offered exhibits containing such evidence. *Marks v. Bow* (1913), 54 Ind. App. 487, 500, 103 N. E. 27, and cases cited; *State, ex rel. v. Central States Bridge Co.* (1912), 49 Ind. App. 544, 549, 97 N. E. 803, and cases cited; *Place v. Baugher* (1902), 159 Ind. 232, 235, 64 N. E. 852; *Indianapolis Outfitting Co. v. Cheyne Electric Co.* (1913), 52 Ind. App. 153, 155, 100 N. E. 468.

We are unable to say from the record before us that the error in excluding this evidence was not harmful to appellant. It related to a material

12. issuable fact which was found against appellant. Such error is presumed to have been

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harmful, and must be so considered unless the record shows the contrary.

The judgment is therefore reversed, with instructions to the lower court to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Ibach, C. J., Batman, P. J., Dausman, Caldwell and Hottel, JJ., concur.

RUDDICK v. HOLLOWELL ET AL.

[No. 10,080. Filed November 25, 1919.]

APPEAL.—*Continuance.*—*Denial.*—*Harmless Error.*—Error, if any, in denying a continuance to a party prayed for on the ground of inability to attend the trial on account of sickness, is harmless where the party appears and testifies on the second day of the trial and three of her witnesses appear the same day, though two of her witnesses had been examined the day previous, where it does not appear that her cause suffered because of her absence.

From Bartholomew Circuit Court; *John W. Donaker*, Judge.

Action between Ella Ruddick and Marcus Hollowell and others. From the judgment rendered, the former appeals. *Affirmed.*

George A. Hoffman, for appellant.

Kollmeyer & Sharpnack, for appellees.

McMAHAN, J.—This was an action for partition. An interlocutory order was entered and the commissioners' report filed.

Appellant, on June 3, 1916, filed exceptions to the report, and on September 8 she filed her amended exceptions, whereupon the hearing on her exceptions was set for September 13. When the cause was called for trial on September 13, appellant filed her verified motion for a continuance, which was overruled.

The only question involved in this appeal is, Was it reversible error for the court to overrule this motion? The appellant in her motion stated that she could not safely go to trial at the time on account of her inability to be present, that she was then in bed sick, and had been since the morning of the twelfth; that she desired to be present in order that she might aid and advise her counsel in the trial; that she had personally subpoenaed all of her witnesses and knew the facts about which they would testify; that she was more familiar with her witnesses and their testimony than her attorneys were, and that her presence at the trial was necessary to a full and fair trial of her cause; that her exceptions arose out of the value of the real estate partitioned and with which she had been familiar all her life; that she could not prove the facts with which she was familiar by any other witnesses so well as by herself; that said facts were true, and that the application was not made for delay. The motion was also supported by the affidavit of Dr. Banker, who stated that he had been in professional attendance upon appellant since the day before; that she was then confined to her bed and was suffering from physical weakness, extreme nervousness, pain in the back of her head and neck, and weak from congestion of the female organs and bladder, and was not then able to leave her bed and appear in court without greatly aggravating her illness and probably endangering her life.

The affidavit was clearly insufficient to authorize the court to grant a continuance on account of the absence of the appellant on the ground that she was a witness. We do not deem it necessary to determine whether the affidavit was sufficient to authorize a continuance on account of the absence of a party, or whether it was error for the court to overrule the same. The cause was submitted to the court for trial on September 13. Two of appellant's witnesses testified on that day. The next day appellant and three of her witnesses appeared and testified. The error, if any, in refusing the continuance was harmless, inasmuch as she was present and testified fully on the trial. *Pick v. Ketcham* (1874), 73 Ill. 366. While she was not present during the examination of two of her witnesses, it does not appear that her cause suffered because of such absence.

We need not cite any authorities in support of the proposition that, as a general rule, the granting of an application for a continuance is within the sound discretion of the trial court, and that the action of the court in overruling such an application will not be reversed, except where the record shows an abuse of judicial discretion to the disadvantage of the complaining party. If it appears from the evidence adduced at the trial that no injustice was done in overruling the motion for a continuance, such fact offers an additional reason why the judgment should not be disturbed. 6 R. C. L. 571.

Judgment affirmed.

Remy, J., did not participate.

La Fontaine Lodge, etc. v. Eviston, Auditor—71 Ind. App. 445.

LA FONTAINE LODGE No. 42, I. O. O. F. v. EVISTON,
AUDITOR, ET AL.

[No. 9,893. Filed June 5, 1919. Rehearing denied October 7, 1919.
Transfer denied November 25, 1919.]

1. TAXATION.—*Exemption.—Burden of Proof.*—The burden is upon one relying upon the exemption of property from taxation, to show that the property comes within some class of property which the statute says is exempt. p. 449.
2. TAXATION.—*Exemption.—“Cemetery Corporations.”—“Fraternal Associations.”*—Section 4447 Burns 1914, Acts 1905 p. 185, exempts property of cemetery associations or corporations incorporated as such under the laws of Indiana, and makes no provisions concerning the property of fraternal associations. p. 450.
3. TAXATION.—*Exemption.—Charitable Purposes.*—Real estate owned by an Odd Fellows Lodge, the rents and profits of which go into a fund for the care of a cemetery owned and operated by the lodge in which the lots are sold without regard to fraternal connections, is not exempt from taxation under §10144 Burns 1914, Acts 1893 p. 12, as being devoted to charitable purposes. p. 451.

From Huntington Circuit Court; *Nelson G. Hunter*,
Special Judge.

Action by La Fontaine Lodge No. 42, I. O. O. F.,
against Ovid E. Eviston and Abner H. Shafer, aud-
itor and treasurer respectively, of Huntington county.
From a judgment for defendants, the plaintiff ap-
peals. *Affirmed.*

Lesh & Lesh, for appellant.

Cline & Cline and *Bowers & Feightner*, for appel-
lees.

McMAHAN, J.—This action was brought by the ap-
pellant against the appellees, Ovid E. Eviston and
Abner H. Shafer, auditor and treasurer respectively

of Huntington county, to enjoin the collection of taxes which have been assessed against certain property owned by the appellant.

A demurrer for want of facts was sustained, and appellant excepted and, refusing to plead further, judgment was rendered against appellant, and it has assigned the action of the court in sustaining the demurrer as error.

The complaint, omitting the caption and signature, reads as follows: "Comes now the plaintiff in the above entitled cause and complains of the defendant and for cause of complaint avers that it is a fraternal association organized under the laws of Indiana; that pursuant to resolutions and proceedings duly passed and performed by its Board of Trustees, it organized of its own membership a cemetery association and as such it acquired title to a large tract of land situated a short distance from the corporate limits of the city of Huntington in said county and state and caused said lands to be laid out and platted as a cemetery, in which cemetery burial lots are sold indiscriminately and without regard to fraternal connections of the applicants. Plaintiff further avers that pursuant to appropriate proceedings taken by the appropriate officers of said association a certain definite portion of the proceeds derived from the sale of lots in said cemetery, to wit, 25 per cent. thereof, has been set aside as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund for the perpetual care and maintenance of said cemetery; that from the proceeds thus derived from the sale of lots and set aside as a perpetual care fund as aforesaid, said association purchased the east one-third of lot 127 and the west one-

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third of lot 128 in the original plat of the town, now city, of Huntington, Indiana, and upon said real estate it has erected a three-story brick building; that by the terms of the deed pursuant to which said property was purchased, as well as the proceedings of said association, all of the rents and profits derived from said property and buildings are set aside to be used as a perpetual care and maintenance fund for the care and maintenance of said cemetery; that said cemetery is suitably located for burial purposes, and is the common, public burial place at Huntington; that the plaintiff herein cannot derive any pecuniary benefit or profit from said property, nor can any of the rents or profit received therefrom be used for any purpose other than for the care and maintenance of said cemetery.

“Plaintiff further avers that the defendants herein have caused said property to be placed on tax duplicate and other tax records and have caused them to be assessed for taxation; that they are demanding taxes thereon and threatening to sell the same for taxes unless the same is paid. Plaintiff further avers that said property is exempt from taxes under the laws of the state of Indiana and the defendants are wrongfully, without authority of law, proceeding to expose it to illegal demands for taxes and threatening to sell the same unless said demands are paid; that the action of said officers in placing said property on the tax duplicate constitutes a cloud on the plaintiffs’ title.

“Wherefore plaintiff prays the court to enjoin the defendants from exposing said property to sale, or making any efforts to collect taxes on said property and to quiet its title against any and all claims of the

defendants and for all further and proper relief in the premises.”

The only question which we are called upon to decide is whether the said building and the land upon which it stands are subject to taxation.

Appellant contends that the said property is exempt from taxation, and in support of this contention cites §4447 Burns 1914, Acts 1905 p. 185; §10144 Burns 1914, Acts 1893 p. 12, which read as follows:

Section 4447.—“That in all cases where cemeteries incorporated under the laws of this state upon such a basis that the corporation cannot derive any pecuniary benefit or profit therefrom; and in all cases where a cemetery association shall provide for setting aside a certain definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets belonging to such corporation used exclusively for cemetery purposes shall be exempt from taxation for any purpose: *And provided*, That it shall be lawful for any person to provide a fund, either by gift, bequest or devise, which may be a perpetual fund, the income from which shall be used for the care and maintenance of any cemetery lot expressly described in the instrument creating the fund, and the fund so created shall be exempt from taxation for any purpose; and a trust may be created for the care, custody and control of such fund, *Provided*, That the real estate of any such corporation lying within any incorporated city or town shall not be exempt from liability for street improvements and sewer assessments, as now or may hereafter be provided by law.”

Section 10144.—“The following property shall be exempt from taxation: * * * Fifth. ‘Every

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building used and set apart for educational, literary, scientific or charitable purposes by any institution, or by any individual or individuals, association or corporation, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situate; also the lands purchased with the *bona fide* intention of erecting buildings for such use thereon, not exceeding forty acres; also the personal property, endowment funds and interest thereon, belonging to any institution, town, township, city or county, and connected with, used or set apart for any of the purposes aforesaid.' "

Section 10144, cl. 6, exempts every cemetery from taxation.

Section 1, Art. 10, of the Constitution directs the legislature to provide for a uniform and equal rate of assessment and taxation for all property, excepting only such as is used for "municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

As said by this court in *Oak Hill Cemetery Co. v. Wells* (1906), 38 Ind. App. 479, 78 N. E. 350: "As appellant is relying upon the exemption of its

1. property from taxation, the burden was upon it to show that its property came within some class of property which the statute says is exempt." The exemptions given by the statutes were not intended to relieve from taxation any property that was or is used by the owners for the purpose of gain and profit.

The appellant's first contention is that the property in question is exempt under the provision of

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§4447, *supra*, which provides that, where cemetery associations shall set aside a definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets belonging to such corporation used exclusively for cemetery purposes shall be exempt from taxation.

The appellant is neither a "cemetery association" nor a "corporation" organized under the laws of the state for the purpose of owning and maintaining a cemetery. It is, as alleged in the complaint, a "fraternal association," and as such bought a large tract of land which it caused to be laid out and platted as a cemetery, twenty-five per cent. of the proceeds derived from the sale of lots being set aside as a perpetual care and maintenance fund for the care and maintenance of said cemetery. From the funds so set aside the appellant purchased the real estate in controversy and erected thereon a three-story brick building, and by some kind of proceedings appellant set aside all the rents and profits derived from the said building as a perpetual care and maintenance fund for said cemetery.

Section 4447, *supra*, is the first and only section of an act amending §1 of "An act exempting from taxation the property of cemeteries organized under the laws of the state upon a basis which prevents the corporation from deriving therefrom benefits or profits." Acts 1895 p. 18.

In construing §4447, *supra*, we must keep the title of the act in mind, and when that is done it is clear that, when the legislature used the words "cemetery association" and "such corporation," it meant ceme-

tery associations or corporations incorporated as such under the laws of this state. That part of said section under which appellant is claiming exemption from taxation would read as follows: "In all cases where a cemetery association, incorporated under the laws of this state, shall provide for the setting aside of a certain definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets of such cemetery corporation used exclusively for cemetery purposes shall be exempt from taxation."

We hold that the property in question is not exempt from taxation under §4447, *supra*.

Appellant next contends that the property in question has been set apart for charitable purposes, and that it is therefore exempt from taxation under

3. §10144, hereinbefore set out. This contention is not supported by principle or authority. Our judgment is that the property in question is not set aside for charitable purposes, and that it is subject to taxation.

There was no error in sustaining the demurrer to the complaint. Judgment affirmed.

ARTHUR ET AL. v. STULTS ET AL.

[No. 9,985. Filed November 25, 1919.]

1. NEGLIGENCE.—*Fire from Threshing Engine.*—*Evidence.*—In an action for loss of a barn by fire alleged to have been communicated by a threshing engine operated without a spark-arrester, evidence that the engine was equipped with one of approved

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type, of common use; in proper place on the engine, and in good condition before and after the fire, together with evidence that the fire broke out inside the barn, 200 feet from the engine, and that one of plaintiff's employes was seen smoking in the barn not long before, is sufficient to support a finding that the fire was not caused by sparks from the engine, although there be other evidence conflicting therewith. p. 453.

2. *APPEAL.—Conflicting Evidence.—Review.*—A verdict rendered upon conflicting evidence finally determines the issues of fact involved. p. 453.
3. *NEGLIGENCE.—Contracts.—Provision Against Extra Hazard.*—A contract between the owner of a threshing outfit and another for the use of the outfit, may lawfully contain a stipulation against liability arising from the increased hazard in the use of wood instead of coal in the engine for fuel, since such a provision did not lessen the responsibility of the thresher for the results of actual negligence in the use of such fuel. p. 453.

From Huntington Circuit Court; *Charles K. Lucas*, Special Judge.

Action by Orland M. Arthur and another against Uriah H. Stults and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

J. W. Moffett, Milo N. Feightner and Fred H. Bowers, for appellants.

Cline & Cline and Watkins & Butler, for appellees.

REMY, J.—This is an action instituted by appellants to recover for the loss by fire of a certain barn. At the time of the fire appellees' threshing outfit was being operated near said barn on appellants' farm, under contract between the parties. It is the theory of the complaint that the fire was caused by the negligence of appellees in operating, without a spark-arrester, a steam engine which constituted a part of the threshing outfit. A trial by jury resulted in a verdict and judgment for appellees. The only error assigned is the action of the court in overruling the

motion for a new trial. Under this assignment appellants have properly presented for our consideration two specifications in their motion, viz.: (1) The verdict is not sustained by sufficient evidence; and (2) the court erred in giving to the jury on its own motion instruction No. 7.

There is much testimony which tends to support appellants' theory of the case, but there is also evidence to the effect that the engine was equipped

1, 2. with a spark-arrester of an approved type in common use; that it had been examined from time to time, both before and after the fire, and found to be in good condition; that it was in its proper place during the time the engine was being operated on appellants' farm; that the fire broke out inside the barn, at a distance of about 200 feet from the location of the engine; and that one of appellants' employes was seen smoking in the barn not long before the fire. Though conflicting, the evidence is sufficient to support a finding that the fire was not caused by sparks from appellees' engine. Appellants' view of the law was fully presented in the instructions given at their request. The verdict of the jury under such circumstances finally determines the issues of fact. *Collins v. Groseclose* (1872), 40 Ind. 414, 417; *Portland, etc., Mach. Co. v. Gibson* (1916), 184 Ind. 342, 346, 111 N. E. 184.

Instruction No. 7 is as follows: "If you find from the evidence that at the time of making the contract for threshing between plaintiffs and defend-

3. ants it was agreed as a part of such contract that in the event wood was used as fuel in the engine plaintiffs would be required to assume the risk of fire caused thereby, then I instruct you that such

a stipulation would apply to the difference in hazard, if any, which existed between the use of wood or coal as fuel, but it would not apply to any defect, if any existed, in the arrester or appliances used about the engine. If you find that the fire complained of was caused by reason of the use of wood instead of coal, and that it was not caused by reason of any defect in the spark-arrester used, then it would be your duty to find for the defendants herein."

The only objection urged against this instruction rests on the rule that a person may not lawfully contract to exempt himself from the results of his own negligence. We are unable to discover the relation of that rule to said instruction. The use of wood for fuel was not in itself negligence, but its use is perhaps more hazardous, under ordinary conditions, than the use of coal. The assumption of this extra hazard by appellants, who under the agreement were to furnish the fuel, was a proper subject of contract, and did not lessen the responsibility of appellees for the results of actual negligence, if any, in their use of such fuel. Their conduct was still to be measured in the light of the increased hazard, but they were not to be responsible for loss arising from such hazard, independently of such negligence on their part. The provision of the contract was lawful, and its application to the facts in issue is correctly set forth in the instruction.

There is no reversible error. Judgment affirmed.

KINNISON v. RARICK.

[No. 10,104. Filed November 25, 1919.]

APPEAL.—Briefs.—Points and Authorities.—Abstract Propositions of Law.—The bare statement of an abstract proposition of law in a brief under the heading "Points and Authorities," without any attempt to apply it to the issues or evidence, is not sufficient to present any question for consideration.

From Noble Circuit Court; *Luke H. Wrigley*, Judge.

Action by John E. Rarick against Lena Kinnison. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Redmond & Emerick, for appellant.
Fred L. Bodenhafer, for appellee.

McMAHAN, J.—Complaint by appellee against appellant for specific performance of a contract for the sale of certain real estate. The appellee in his complaint alleged the execution of the contract wherein it was agreed that the appellant would sell and, by a warranty deed, convey to appellee certain real estate in Noble county, Indiana, for the sum of \$350; that appellee was to pay appellant the sum of \$5 per month for three years from the date of the execution of the contract, and at any time within that period when appellee notified appellant that he was ready to purchase said property for said \$350, the \$5 per month which had been paid by appellee to appellant should be applied as partial payments on said sum of \$350; that, if appellee failed to purchase real estate in accordance with said agreement, appellant might treat

the same as a rental contract, and that the monthly payments should be considered as rent; that prior to the expiration of the contract appellee tendered to appellant the sum of \$170, that being the balance due appellant on the contract, and demanded a deed, which appellant refused to execute. Appellant filed an answer in four paragraphs: (1) A general denial; (2) that after the execution of the contract sued on, it was for a valuable consideration mutually agreed between the appellant and appellee that said contract should be abandoned and rescinded, and that said contract was abandoned; (3) that, by mutual agreement and consent of the parties to the contract, it was modified and changed in this, that appellant and appellee agreed that, if appellant would make certain repairs and improvements on said real estate at her own expense, said contract of purchase was to be rescinded and held of no effect, and that, in pursuance of this alleged agreement, the appellant made said repairs; (4) that appellant was induced to execute the contract by reason of fraudulent representations made by appellee.

The cause was tried by the court and resulted in a decree in favor of appellee for the specific performance of the contract. Appellant filed a motion for a new trial. The only specifications in the motion that present any questions are: (1) That the decision of the court is contrary to law; (2) the decision of the court is not fairly supported by, and is clearly against the weight of, the evidence; (3) that the contract sued on was obtained by reason of certain fraudulent representations. The only error assigned is the action of the court in overruling the motion for a new trial.

The appellant insists that, inasmuch as the issues in this case are of exclusive equitable jurisdiction, the court has the right, under §698 Burns 1914, Acts 1903 p. 338, to consider, and that it is our duty to consider and weigh, the evidence with the view of ascertaining whether or not the decree of the court should be upheld. Appellant's main contention is that the contract sued on was obtained by fraud and overreaching, and should not be enforced. The only witnesses who testified upon this issue were appellant and appellee. The trial court saw and heard both of these witnesses, and was in a much better position to weigh their testimony than we are, and, granting that it is our duty to weigh the evidence in a case of this character, a proposition which we do not decide, we would not, under the circumstances, be justified in saying that the finding of the trial court on the question of fraud is not fairly sustained by the evidence.

Appellant, under the heading of points and authorities, says: "Before the contract will be specifically enforced, it should appear from the evidence that it was fair, reasonable and just, and one which is strictly equitable to enforce."

Admitting this to be a correct statement of the law, appellant has wholly failed to apply the proposition to the contract or to the evidence. No claim is made that the contract is not fair, reasonable, and just, or that there is evidence which would justify this court in so holding. The bare statement of an abstract proposition of law, without any attempt to apply it to the issues or to the evidence, is not sufficient to present any question for our consideration. Our attention has not been called to any evidence or to

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any part of the contract which might indicate that it was not a fair and just contract. There was no error in overruling the motion for a new trial.

Judgment affirmed.

LOWENMEYER v. NATIONAL LUMBER COMPANY.

[No. 10,070. Filed November 25, 1919.]

1. CORPORATIONS.—*Foreign Corporations.—Admission.—Statutes.—Construction.*—When statutes governing the admission into the state of foreign corporations do not specify what shall constitute “doing business” or “transacting business,” such question is ordinarily a matter for judicial determination. p. 464.
2. CORPORATIONS.—*Foreign Corporations.—Transacting Business.—Isolated Acts.—Construction.*—Where a foreign corporation enters into a single contract or engages in some other isolated business act within a particular state, with no intention to repeat the same therein or make such state a base for the conduct of any part of its corporate business, the courts as a rule have held that such corporation cannot be said to be “doing business” or “transacting business” within the meaning of the usual statutory provisions regulating the admission of foreign corporations. p. 464.
3. CORPORATIONS.—*Foreign Corporations.—Admission.—Purchasing and Using Site.*—Where a foreign corporation purchases real estate for use as a coal yard and so uses the same in conducting a retail coal business within this state, such purchase is not an isolated transaction, and the act of acquiring such site fell within the inhibition against doing business provided in §4085 Burns 1914, Acts 1907 p. 286, §1. p. 464.
4. CORPORATIONS.—*Foreign Corporations.—Admission.—Comity.—Limitation by Statute.*—The doctrine of state comity cannot prevail in the judicial construction of the nature of acts performed by a foreign corporation within this state, under §§4085 *et seq.* Burns 1914, Acts 1907 p. 286, since §8 of the statute, §4093 Burns 1914, expressly states that the statute is a limitation upon interstate comity. p. 464.

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5. CORPORATIONS.—*Foreign Corporations.—Admission.—Noncompliance With Statute.—Resort to Courts.—Inhibition Unlimited.*—The resort by a foreign corporation to the courts of this state without first having complied with the requirements of §§4085 et seq. Burns 1914, Acts 1907 p. 286, is inhibited by §9 of the statute, §4094 Burns 1914, equally against a claim arising out of an isolated or preliminary transaction as against one arising out of the usual business conducted by the corporation. p. 465.
6. CORPORATIONS.—*Foreign Corporations.—Contracts.—Assignees.—Noncompliance With Statutes.—Resort to Courts.*—The assignee of the contract of a foreign corporation cannot assert any rights thereunder which could not have been asserted by the foreign corporation through which he claims by assignment from its trustee in bankruptcy and an intervening third person, where the corporation has failed to comply with a statute giving it a right to transact business in the state, notwithstanding that the assignee took the contract before breach thereof. p. 466.
7. CORPORATIONS.—*Foreign Corporations.—Admission.—Noncompliance With Statutes.—Stockholders.—Estoppel.*—A stockholder in a foreign corporation which has not complied with the statute regulating its admission to do business in the state is not estopped in an action brought against him upon a contract between him and the corporation from asserting such failure to comply as a defense to such action. p. 467.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Benjamin Lowenmeyer against the National Lumber Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Howell & Jones and *Theodore Johnson*, for appellant.

Eli F. Seebirt, *Daniel D. Schurtz*, *Fred C. Klein* and *George W. Zinky*, for appellee.

BATMAN, J.—This is an action by appellant against appellee to enforce the specific performance of a contract involving a sale of real estate. It is alleged that the Harmon Coal Company, a corporation organized

under the laws of the State of Delaware, contracted with appellee, a corporation organized under the laws of the State of Indiana, for the purchase of certain real estate in South Bend, Indiana; that appellee received part of the purchase price in cash, took stock in said coal company for a portion thereof, and gave time for the payment of the balance due thereon; that said coal company was adjudged a bankrupt, and its rights under said contract were duly sold by a trustee in bankruptcy to one Bliss, who transferred the same to appellant; that appellant tendered to appellee the balance of the purchase money for said real estate and demanded a deed of conveyance therefor, which was refused. To the complaint appellee filed an answer in abatement in two paragraphs, each of which is based on the alleged fact that said coal company was and is a foreign corporation, and at the time of the purchase of said real estate it had not, nor has it since said time, complied with the law of this state, with reference to the admission of foreign corporations for the purpose of transacting business, and exercising its corporate powers. Appellant filed a demurrer to each of these paragraphs, which was overruled, and he then filed a reply thereto in general denial. The cause was thereupon submitted to the court for trial on the issues thus formed and, upon a special finding of facts made upon request, a conclusion of law was stated in favor of appellee, and a judgment was rendered thereon that the action abate. From this judgment appellant prosecutes this appeal, and alleges that the court erred in overruling his demurrer to each paragraph of the answer in abatement, and in stating its conclusion of law on the special finding of facts.

We will first direct our attention to the alleged error based on the action of the court in stating its conclusion of law in favor of appellee, on the special finding of facts, as a determination of the questions raised in that connection will be decisive of this appeal. So much of the special finding of facts as is necessary for an understanding of the questions presented and determined with reference to the alleged error under consideration is substantially as follows: That appellee is, and has been ever since October 1, 1912, a corporation duly organized under the laws of the State of Indiana, with powers only to buy and sell lumber and do a lumber business, and with such other powers as are by law incident thereto, and that said corporation, since the above-mentioned date, has been doing business only in the city of South Bend, Indiana; that on said date the Harmon Coal Company was, and for more than one year before said date had been, a corporation duly organized under the laws of the State of Delaware, with powers only to engage in the purchase and sale of coal and fuel, and to hold such real estate as may be necessary to carry on said business; that on said date said foreign corporation, Harmon Coal Company, established a place of business in South Bend, Indiana, where, and from which time until the year 1914, it engaged in the business in said city and state of buying and selling coal at retail; that on said date appellee was the owner of certain real estate in the city of South Bend, Indiana, described in appellant's complaint; that on said date appellee and the coal company entered into a certain contract whereby the former sold said real estate to the latter; that the coal company purchased said real estate for the purpose of using it as a coal

yard, and in conducting its business in said city of South Bend; that beginning with October 14, 1912, and until the year 1914, it did carry on its business of selling coal for profit in said city, from and upon said real estate; that the contract between said coal company and appellee was negotiated and entered into on behalf of the coal company by its agent, Howard R. Van Auken, in the city of South Bend, Indiana, and that all things done on behalf of said foreign corporation in the purchase of the real estate were done by it in said city and state, and that said real estate was bought by it through its said agent for the purpose of establishing a permanent place of business in the city of South Bend; that on October 12, 1912, the coal company, in pursuance of the terms of said contract, paid to appellant the sum of \$50, and issued to it its certificates for 100 shares of the preferred stock of said coal company and 100 shares of the common stock thereof; that said shares of stock were received by appellee as a payment of \$1,000 on the purchase price of said real estate, and that said coal company executed to appellee its promissory note for \$2,950, due on March 1, 1913, which note was delivered to appellee when said coal company approved the abstract of title to said real estate; that a portion of the indebtedness represented by said note was paid, but that the sum of \$2,000 thereof remained unpaid; that on August 10, 1914, a petition in bankruptcy was filed in the United States District Court, and subsequently on October 6, 1914, an order was entered thereon adjudging said coal company a bankrupt; that on said date the Central Trust Company of Illinois was duly appointed a trustee in bankruptcy of said coal company, duly qualified as such,

and entered upon the performance of its duties as such trustee; that on January 19, 1915, the United States District Court ordered said trustees to sell all his right, title and interest in and to said real estate without notice; that at such sale one Willis K. Bliss became the purchaser of said trustee's right, title and interest in said real estate, and said trustee, after the approval of the sale, executed to said Bliss a deed for said real estate; that thereafter, on January 19, 1915, said Bliss, together with his wife, for a valuable consideration, conveyed by deed his rights in and to the real estate to appellant; that appellee was named in the schedule of creditors as a creditor of the coal company in the proceedings of bankruptcy. In addition to the foregoing, facts were found which show that the Harmon Coal Company had not performed the acts required by law for its admission into this state for the transaction of business or exercise of its corporate powers.

Appellant first contends that the contract for the purchase of the real estate in question is not within the inhibition of the statute regarding the transaction of business within this state by foreign corporations. The statute in question provides as follows: "That before any foreign corporation for profit shall be permitted or allowed to transact business or exercise any of its corporate powers in the State of Indiana, other than insurance companies, building and loan companies and surety companies, they shall be required to comply with the provisions of this act and shall be subject to all the regulations prescribed herein, as well as all other regulations, limitations and restrictions applying to corporations of like character organized under the laws of this state." §4085 Burns 1914, Acts 1907 p. 286.

Similar statutes have been enacted by many of the states, but as a rule they do not undertake to specify the particular acts or transactions that shall constitute "doing business" or "transacting business." Such question, therefore, is ordinarily a matter of judicial determination. The courts as a rule have held that, where a foreign corporation enters into a single contract, or engages in some other isolated business act within a particular state, with no intention to repeat the same therein, or make such state a basis for the conduct of any part of its corporate business, such corporation cannot be said to be "doing business" or "transacting business" within such state, within the meaning of the usual statutory provisions regulating the transaction of business by foreign corporations. 12 R. C. L. 69; 19 Cyc 1268; *Penn Collieries Co. v. McKeever* (1905), 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127; *Hart-Parr Co. v. Robb-Lawrence Co.* (1906), 15 N. D. 55, 106 N. W. 406; *Booth & Co. v. Weigand* (1906), 30 Utah 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693; *Cooper Mfg. Co. v. Ferguson* (1885), 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *D. & H. Canal Co. v. Mahlenbrock* (1899), 63 N. J. Law 281, 43 Atl. 978, 45 L. R. A. 538; *Kirven v. Virginia, etc., Chemical Co.* (1906), 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219. In the instant case, however, it is evident that the act of purchasing the real estate in question does not fall within that class of cases denominated isolated transactions. The special finding of facts expressly shows that the real estate was purchased by said coal company for the purpose of using the same as a coal yard in conducting its business in the city of South Bend, and that it began to use it

for such purpose immediately after its purchase, and continued so to do until the year 1914. But appellant contends that the act of purchasing the real estate was merely the exercise of rights existing by comity, and was only preliminary to doing the business contemplated by the corporation. The doctrine of state comity, which appellant seeks to invoke, cannot prevail against the statute, which states that its provisions are a limitation to interstate comity. §4093 Burns 1914, *supra*. The special finding of facts shows that the foreign corporation in question had the power to acquire and hold such real estate as might be necessary to carry on its business of dealing in coal and fuel, and it cannot be said with reason that the act of acquiring a place for the conduct of such business, under the facts found, although in a sense preliminary, did not fall within the inhibition of the statute.

But, even if it could be said that the purchase of said real estate was an isolated transaction, or merely preliminary to the conduct of the principal

5. business of such foreign corporation, and for either of these reasons was not transacting business or exercising corporate powers, within the meaning of §4085, *supra*, still, under the facts found, this action must abate. The special finding of facts clearly shows that said foreign corporation, Harmon Coal Company, for a period of more than one year, did transact a coal business for profit, from and upon the real estate in question, without complying with the act relating to such corporations engaging in business in this state. Section 4094, *supra*, is a part of said act, and it expressly provides as follows: "If after this act shall take effect any foreign corporation

shall fail to comply herewith, no suit may be maintained, either in law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state." This inhibition would evidently be as effective against a claim arising out of an isolated or preliminary transaction as it would be against one arising out of the usual business conducted by such corporation.

Appellant contends that, even if it should be held that the purchase of said real estate was the transaction of business within the meaning of §4085,

6. *supra*, still this would not affect his right to maintain this action. He bases this contention on the fact that the contract in question is not void, and asserts that he, being an assignee thereof before breach, may enforce the same, notwithstanding any failure on the part of such foreign corporation to comply with the statute under consideration. We cannot concur in this contention. It is well settled in this state that, where a foreign corporation has failed to comply with a statute giving it a right to transact business in this state, and becomes insolvent, a receiver or trustee appointed to administer its affairs cannot maintain an action brought in this state on a claim arising therein; and that, where such corporation reaches a state that prevents a compliance with such statute, the facts with reference to its noncompliance and condition may be pleaded in bar to the action. *Wiestling v. Warthin* (1890), 1 Ind. App. 217, 27 N. E. 576; *Swing v. Wellington* (1909), 44 Ind. App. 455, 89 N. E. 514; *Swing v. Toner* (1912), 178 Ind. 102, 96 N. E. 946. It is thus made apparent that appellant, as assignee of the contract in suit, cannot assert any right thereunder which could not have been

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asserted by the foreign corporation through which he claims.

It is also contended by appellant, in effect, that appellee, being a stockholder in said foreign corporation and having failed to take any step to se-

7. cure its compliance with the statute in question, has waived any defense based on such failure, and is estopped from asserting any such defense. We cannot agree with this view of the law. A casual reading of the authorities which treat of the relation existing between stockholders and the corporation of which they are members, and of their powers and duties in the management of its affairs, will readily disclose that appellant's contention in this regard is without foundation. 10 Cyc 373, 760.

We conclude that the court did not err in stating its conclusion of law on the special finding of facts and, for the reasons given above, there was no error in overruling the demurrer to either paragraph of the answer in abatement. Finding no error in the record, the judgment is affirmed.

STATE OF INDIANA v. FIRST CALUMET TRUST AND
SAVINGS BANK OF EAST CHICAGO, EXECUTOR.

[No. 10,541. Filed November 26, 1919.]

TAXATION.—Inheritance Tax.—Federal Estate Tax.—Deductions.—

The amount paid under the provisions of the Federal Estate Tax Law of 1916 should be allowed as a reduction of the net estate upon which to base the assessment of inheritance tax under §§10143a *et seq.* Burns 1914, Burns' Supp. 1918, Acts 1913 p. 79, Acts 1917 p. 367.

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From LaPorte Circuit Court; *James F. Gallaher*, Judge.

Proceeding by the State of Indiana against the First Calumet Trust and Savings Bank of East Chicago, Indiana, executor of the estate of Charles W. Hotchkiss, deceased. From a judgment assessing inheritance tax, the state appeals. *Affirmed.*

Ele Stansbury, Attorney-General, and *Edward M. White*, for the state.

Elias D. Salsbury, *Philo Q. Doran*, *Frank J. Conboy* and *L. L. Dent*, for appellee.

NICHOLS, C. J.—This action and proceeding is under the Indiana Inheritance Tax Law (Acts 1913 p. 79, §10143a *et seq.* Burns 1914), as amended by act of 1917 (Acts 1917 p. 367, §10143a *et seq.* Burns' Supp. 1918). The inheritance tax appraiser of Laporte county, Indiana, on November 9, 1918, filed in the office of the clerk of Laporte Circuit Court his report of the appraisement of the estate of Charles W. Hotchkiss, deceased, who died testate the owner of property in Laporte county, Indiana, on October 28, 1916. After due notice, at the time fixed the court found that the total gross value of the said estate located in Laporte county was \$499,505.64; that there should be deducted as debts, claims and expenses, etc., therefrom \$117,069.74, such deduction including the \$28,389.71 federal estate tax, leaving a net value for distribution of \$382,435.90, and assessed the inheritance tax thereon, less exemptions allowed by law, at a total of \$9,574.05. The auditor of state then filed a motion in the Laporte Circuit Court, on behalf of the State of Indiana, for a rehearing and new trial of said cause under and pursuant to §15 of the act of 1913, *supra*, which motion was overruled. Judgment was

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then rendered, assessing the inheritance tax upon the transfer of the property of said estate at \$9,574.05, and appellee was ordered to pay such sum to the treasurer of Laporte county, Indiana. In such judgment a claim for deductions on account of debts, etc., in the sum of \$117,069.74 was allowed and deducted. From this judgment the State of Indiana prosecutes this appeal.

The substantial question presented by appellant is whether the court erred in allowing a deduction from the value of decedent's property, so assessed for inheritance tax, the said sum of \$28,389.71, being the federal estate tax paid by appellee to the United States, the question involved being whether the unit of taxation shall be the net value of said estate after the federal estate tax is paid, or the value of said estate before such federal estate tax is deducted. The Federal Estate Tax Law of 1916 is found in 39 U. S. Stat. at L., 64th Congress, part 1, p. 777. Section 201 (§6336 $\frac{1}{2}$ b U. S. Comp. Stat. 1916) of that act provides that a tax be imposed upon the transfer of the *net estate* of any decedent dying after the passage of the act, whether a resident or nonresident of the United States. Section 203 (§6336 $\frac{1}{2}$ d, *supra*) of such act provides that for the purpose of the tax the value of the net estate shall be determined in the case of a resident by deducting from the value of the estate such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwrecks, or other casualties, or from theft, support during the settlement of the estate of those dependent upon the estate, and such other charges against the estate as are al-

lowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, and an exemption of \$50,000. Section 208 provides that it is the purpose and intent of the act that, so far as is practicable, and unless otherwise directed by the will of the decedent, the taxes shall be paid out of the estate before its distribution.

It is to be noted that the subtitle of the act is "Estate Tax." From the foregoing it is evident that the tax imposed by the federal government is upon the estate, and that it is payable out of the residue of the estate after deductions therefrom are allowed by the respective jurisdictions. It is a tax imposed upon the transfer by death, and not upon the succession resulting from death, for it is payable out of the estate before its distribution. From the foregoing it is apparent that the unit of taxation under the Federal Estate Tax Law is the net estate after such deductions as are allowed by the jurisdictions in which the estate is located.

Let us now examine the inheritance tax law of the State of Indiana. We should note in the beginning the difference between the title of the Indiana act and the federal act, in this, that the federal act is entitled an "Estate Tax," while the Indiana act is entitled an "Inheritance Tax," the one implying that which is left by the decedent, while the other implies that which is received by the heir. Section 10143a Burns 1914, *supra*, provides that a tax shall be imposed upon any transfer of any property, whether real, personal, or mixed, or any interest therein to any person, and that the tax so imposed shall be upon the market value of such property. Section 10143b, *supra*, pro-

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vides a primary rate of taxation upon the clear market value of the beneficial interest that passes, the amount of such primary rate depending upon the relationship to the decedent of the persons entitled to such beneficial interest. Section 10143c, *supra*, provides that, when the amount of the clear market value of any such interest to which any person becomes beneficially entitled is more than \$100,000 and less than \$500,000, the rate shall be two and a half times the primary rate as provided in §10143b, *supra*. This tax, it will be observed, is not imposed upon the transfer of the estate occasioned by death, but upon the transfer to the legatee or devisee, if the transfer is the subject of a legacy, or devise, or to the heir, if the transfer is the subject of a distribution or descent, and is made upon the clear market value of the interest of such beneficiary; and the beneficiary to whom such interest is transferred, as well as the administrator, executor, or trustee, is personally liable for the payment of such tax. The tax paid to the federal government upon the net estate before distribution cannot in any sense be held to have been any part of the beneficial interest of the respective legatees or distributees, and the market value of such beneficial interest must of necessity be the value after deducting the federal tax, the same having been deducted from the net estate before distribution was made thereof, and it necessarily follows that the state inheritance tax should be computed upon the residue after deducting from the net estate the amount of such federal estate tax. This view of the law is sustained by *People v. Pasfield* (1918), 284 Ill. 450, 120 N. E. 286; *State, ex rel. v. Probate Court* (1918), 139 Minn. 210, 166 N. W. 125; *Roebbling's Estate* (1918),

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(N. J. Prerog.) 104 Atl. 295. In each of the states represented by these authorities, the Inheritance Tax Law is similar to the law of Indiana. Appellant calls our attention to the cases of *Knowlton v. Moore* (1900), 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; *Matter of Gihon* (1902), 169 N. Y. 443, 62 N. E. 561, as being cases in principle not different from the instant case, but these cases were each based upon the acts of Congress of 1898, in which act the unit of value was the distributive share or beneficial interest of the person to whom the property was distributed. In this particular there is a marked difference between the act upon which the Gihon and Knowlton cases were based and the acts of 1916, upon which the instant case is based. In the case of *Matter of Sherman* (1917), 179 App. Div. 497, 166 N. Y. Supp. 19, it was held that the Estate Tax Law, which is similar to the law of Indiana relating to taxable transfers, did not contemplate a deduction from the decedent's estate as an expense of administration of the federal estate tax imposed by the act of Congress of 1916 in determining the amount of the state transfer tax, but this holding was reversed by the Court of Appeals of New York (1917), 222 N. Y. 540, 118 N. E. 1078. *In re Week's Estate* (1919), 169 Wis. 316, 172 N. W. 732, a case under a similar statute, is not in harmony with our view of the law, nor with the cases above cited.

The judgment is affirmed.

Union Traction Co. v. Ross, Rec.—71 Ind. App. 473.

UNION TRACTION COMPANY OF INDIANA v. ROSS,
RECEIVER.

[No. 10,116. Filed November 26, 1919.]

1. PLEADING.—*Conclusions.—Legal Effect of Facts Plead.*—A conclusion of the pleader as to the legal effect of transactions before stated adds nothing to the pleading. p. 475.
2. RAILROADS.—*Street Railroads.—Crossings.—Maintenance Contracts.—Privity.—Consideration.—Statutory Rights and Duties.*—A contract between a railroad and a street railroad for a crossing in a city street, whereby the owner of the street railroad agreed to maintain such crossing at its own expense and to the approval of the railroad, is not enforceable when pleaded in an action between successors in ownership of the two roads to recover the cost of repairs made by the railroad to the street crossing involved unless facts be pleaded showing privity of contract or of estate on the part of the defendant with the contracting owner of the street railroad company, nor where the facts pleaded show that the promise of maintenance in the contract was without any sufficient consideration and, under such circumstances §§5676, 5677 Burns 1914, Acts 1901 p. 461, fixed the rights and duties of the parties. p. 475.
3. RAILROADS.—*Street Railroads.—Crossings.—Maintenance.—Conclusions of Law.*—A conclusion of law awarding to a railroad the full amount of its expense in repairing a street railroad crossing is erroneous, in view of the provisions of §§5676, 5677 Burns 1914, Acts 1901 p. 461. p. 477.

From Grant Circuit Court; *J. F. Charles*, Judge.

Action by Walter L. Ross, as receiver of the Toledo, St. Louis and Western Railroad Company, against the Union Traction Company of Indiana. From a judgment for plaintiff, the defendant appeals. *Reversed.*

J. A. VanOsdol, for appellant.

Geddes VanBrunt and *C. A. Schmettau*, for appellee.

ENLOE, J.—This was an action by appellee, as receiver of the Toledo, St. Louis and Western Railroad Company, to recover the cost of certain repairs made to certain street crossings, therein mentioned. The action was based upon three certain contracts concerning the maintenance of the crossings which it was alleged had been repaired, which said contracts had been entered into by and between former owners of said roads, and to which ownership the parties hereto were severally the successors.

One of said contracts related to the crossing of the tracks of said parties on Railroad avenue, Marion; another to the crossing on South Washington street, Marion; and the other to the crossings at Wabash street and at Kentucky street, in the city of Kokomo. The complaint was in three paragraphs, each founded upon one of the above-mentioned contracts. In each of said contracts the street railroad company had agreed in substance that it would thereafter at all times keep and maintain, at its own expense, said crossings and renewals thereof, to the approval of the party of the first part—the steam road. The contracts are very similar to those upon which the action was founded in cases of *Evansville, etc., Traction Co. v. Evansville Belt R. Co.* (1909), 44 Ind. App. 155, 87 N. E. 21; *Baltimore, etc., R. Co. v. Cincinnati, etc., R. Co.* (1913), 52 Ind. App. 639, 99 N. E. 1018; and *Vandalia R. Co. v. Fort Wayne, etc., Traction Co.* (1918), 68 Ind. App. 120, 118 N. E. 839.

Two of the contracts were made prior to the act of 1901 (Acts 1901 p. 461, §§5676-5677 Burns 1914) and one was made subsequently to the taking effect of said act.

To each of said paragraphs of complaint a demur-

rer was interposed with memorandum as required by statute, which demurrer was by the court overruled, and appellant then answered said complaint in four paragraphs, to each of which, except the first, the same being a general denial, a demurrer was sustained.

There was a trial by the court, which, upon request, made a special finding of the facts and stated its conclusions of law thereon, favorable to appellee, to which appellant duly excepted, and judgment was rendered accordingly.

Appellant then moved the court to modify the judgment, and, this motion being overruled, it filed its motion for a new trial, which was also overruled, and it now prosecutes this appeal.

The errors relied upon for a reversal are: (1) Error in overruling demurrer to complaint; (2) error in conclusions of law; (3) error in overruling motion to modify judgment; (4) error in overruling motion for new trial.

The alleged deficiencies in the several paragraphs of complaint, as stated in the memorandum filed with said demurrer, were: (1) The facts stated show no privity of contract between the parties thereto; (2) the facts stated show there was no consideration to support the promise sued on; and (3) the obligations of the parties in the matter in question are fixed by statute.

The language of the first paragraph of the complaint herein, whereby it was sought to charge appellant as being in privity with said contract sued

1-2. on, is as follows: "Plaintiff says that the defendant herein has, since the execution of said contract, by purchase and consolidation, ac-

quired all the rights, franchises, and property of said Marion Street Railroad Company, and thereby assumed and is now bound by all its contracts and obligations including the contract aforesaid."

The same averment as to privity is found in each of the other paragraphs of complaint.

In the case of *Evansville, etc., Traction Co. v. Evansville Belt R. Co.*, *supra*, it was said: "The appellant, however, was not a party to the contract, and the obligations of a contract are ordinarily limited to the parties by whom they are made, and those who stand in privity with them, either in estate or contract.

* * * And unless it is shown by the facts pleaded that the appellant is in privity of contract or privity of estate with the street railroad company, whose stipulation is sought to be enforced against it, or there is some equitable ground upon which appellant can be held bound to perform the stipulation, the appellee is not entitled to recover."

The averment in each paragraph of the complaint, "and thereby assumed and is now bound," etc., is a mere conclusion of the pleader, as to the legal effect of the transactions before stated, and adds nothing to the pleading. *Central Bank, etc. v. Martin* (1919), 70 Ind. App. 387, 121 N. E. 57; *Mackey v. Lafayette, etc., Trust Co.* (1919), 70 Ind. App. 59, 121 N. E. 682. There was no sufficient averment of privity.

The facts, as pleaded, also show that the promises in question sued on were without any sufficient consideration, and therefore not enforceable and, under the circumstances and conditions pleaded, the statute fixed their rights and duties. *Baltimore, etc., R. Co. v. Cincinnati, etc., R. Co.*, *supra*; *Vandalia R. Co. v. Fort Wayne, etc., Traction Co.*, *supra*.

It is next urged that the court erred in its conclusions of law upon the facts found. The court found that the appellee had made repairs to the several crossings in question in and to the amount of \$58.18, and stated as its conclusion of law that appellee was entitled to recover this sum from the appellant, and rendered judgment accordingly. The statute before cited makes it the duty of each railroad to keep in a safe condition and repair its own track at crossings, and appellant, at most, could only be liable for the repairs made on its own track, and for one-half of the cost of repairs to the crossing made as repairs to the street or highway. The court erred in its conclusion of law.

Appellant also insists that the court erred in overruling its motion to modify the judgment, but, as the judgment must follow the conclusions of law, the court did not err in overruling said motion.

For the errors above indicated, this cause is reversed and remanded, with directions to the trial court to set aside the judgment rendered herein, to sustain the demurrer to the complaint, and for further proceedings.

MILHOLLIN ET AL. v. MILHOLLIN.

[No. 9,885. Filed November 28, 1919.]

1. **ARBITRATION AND AWARD.—Dispute.—Sufficiency.**—It is not ground for objection to an award that the arbitration is comprised wholly of matters adjudicated by the final settlements in certain estates, since a legal cause of action is not necessary

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to authorize a submission, a dispute, controversy, or honest difference of opinion, either as to liability or amount, being sufficient. p. 480.

2. HUSBAND AND WIFE.—*Agency.—Rules.*—The relation of agency between husband and wife is governed by the same rules which apply to other agencies. p. 481.
3. HUSBAND AND WIFE.—*Agency.—Creation.—Evidence.*—Evidence held sufficient to sustain a finding that the husband of one of defendants had authority from such defendant to enter into agreement to arbitrate. p. 481.
4. ARBITRATION AND AWARD.—*Action on Award.—Admissibility of Award.*—In an action on an award, the award is admissible in evidence. p. 484.
5. ARBITRATION AND AWARD.—*Facts of Arbitration.—Evidence.—Admissibility.*—In an action on an award, testimony by arbitrator of what was said and done at the hearing of the amount of his charges, held unobjectionable. p. 484.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by William L. Milhollin against Samuel Milhollin and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Harry Long and *George W. Cromer*, for appellants.
Koons & Koons, for appellee.

McMAHAN, J.—The appellee's complaint was in two paragraphs. It is alleged in the first paragraph that Nathan Milhollin died testate in 1901, leaving a widow, Mary Milhollin, and three children, William L. Milhollin, appellee, Samuel Milhollin and Allie M. Benoy, appellants herein, as his only heirs and legatees; that the estate of said Nathan Milhollin was administered and finally settled in the Delaware Circuit Court in 1903; that the widow, Mary, died intestate in 1909, leaving said three children as her sole and only heirs; that an administration was had upon her estate and final settlement made in 1910; that

in January, 1912, certain differences and controversies existed between appellants and appellee in relation to mutual dealings and business transactions by and between them arising out of the estate of Nathan Milhollin and in connection therewith, and in the settlement of a partnership between Nathan Milhollin and his said two sons, and the expense of William Milhollin in defending certain litigation relative to certain real estate that had been owned by said partnership, and that said partnership was administered and finally settled by said Delaware Circuit Court in 1903. The several claims alleged to have been in dispute are fully stated, and it is alleged that for the purpose of settling all of said disputes, differences and controversies, the said three children, William, Samuel and Allie, by their oral agreement, submitted said differences between them to arbitration and referred the same to Dee R. Jones as arbitrator; that notice was given, and that the parties met and appeared before said Jones, who as arbitrator heard the evidence and statements of the parties, and in February, 1912, made and rendered his written award, wherein it was found and decided that Samuel owed appellee \$455.22, and that Allie owed appellee \$111.25. A demand by appellee and a refusal by appellants to comply with the terms of the award and to make payment are alleged, and judgment is demanded for the amount of the award, a copy of the award being attached to and made a part of the complaint. The second paragraph of complaint was upon an open account. Appellants filed a demurrer to both paragraphs, which was overruled as to the first and sustained as to the second. The court found the facts specially, and stated its conclusions of law thereon

in favor of appellee, and rendered judgment for the appellee for the amount named in the award with interest. Appellants excepted to each conclusion of law, and filed a joint and separate motion for a new trial.

The errors assigned are that the court erred (1) in overruling a demurrer to the first paragraph of complaint, (2) in each of the conclusions of law, and (3) in overruling the motion for a new trial. The appellants contend that the court erred in overruling their demurrers to the first paragraph of complaint, and in each of the conclusions of law, for the reason that the final settlement of the estates of Nathan and Mary Milhollin, and of the estate of said partnership are final judgments, determining and adjudicating all the claims mentioned in the complaint and award, and that there were and could be no disputes and controversies arising out of such estates and partnership to arbitrate so long as the judgments of the court settling said estates and partnership remained in force and effect.

This contention is an evasion of the real question presented by the record and cannot prevail. It is not necessary that a party should have a legal

1. cause of action to authorize a submission and award and to bind the parties by the award. The difference of opinion between the parties upon the whole case, including the appellants' legal liability as well as the amount of the claims, might have been submitted to and determined by the arbitrator. To furnish a sufficient basis for entering into a submission no legal cause of action in favor of either party need exist. That there is a dispute, controversy, or honest difference of opinion between them

concerning any subject in which they are both interested is enough, nor indeed is it as necessary that they should have come to the actual point of dispute, for a matter simply in doubt may be submitted. It is sufficient to sustain the arbitration if the appellee's claim was made in good faith; that it was disputed by appellants, and that it was submitted to arbitration. *Downing v. Lee* (1903), 98 Mo. App. 604, 73 S. W. 721; *Findly v. Ray* (1857), 50 N. C. 125; Morse, Arbitration and Award 36.

The next contention is that the court erred in overruling appellants' separate motions for a new trial on the grounds that the facts as found by the court are not sustained by sufficient evidence and are contrary to law, and because of the alleged errors in the admission of certain evidence.

The first claim of appellants is that there is no evidence that Allie M. Beuoy ever agreed to submit the claims to arbitration; that the alleged 2-3. agreement to arbitrate was made by her husband, Charles Beuoy, and that he had no authority from her to make any such agreement. The appellants make no claim that a husband may not act as the agent of his wife, and as such bind her by an agreement to arbitrate. The only claim is that there was no evidence that the appellant Allie M. Beuoy authorized her husband to act as agent in said matter. The relation of agency between husband and wife is governed by the same rules which apply to other agencies. These rules and the authorities in support of them are set out in *Roper v. Cannel City Oil Co.* (1918), 68 Ind. App. 637, 121 N. E. 96. See, also, 13 R. C. L. 1167.

Charles and Allie M. Beuoy were married in 1892

or 1893, and ever since that time the husband has looked after and transacted all of his wife's business. He was one of the executors of Nathan Milhollin's estate, the administrator of Mary Milhollin's estate, took sole charge of litigation in which his wife was interested and, for a year or more prior to the date of the alleged arbitration, had represented his wife in several meetings with the appellee and Samuel where efforts were made to settle their conflicting claims, and a short time before the meeting with Jones, who made the award sued on, he met the appellee and Samuel at a time when it was proposed or agreed that one Maynard should settle their claims for them and, when the parties met with Maynard for that purpose, he was present to represent his wife. This attempt to settle the conflicting claims failed. The relationship between Charles Beuoy and appellee was somewhat strained—so much so that they did not deal directly with one another. After the meeting with Maynard, appellee made a proposition to his brother Samuel to submit their claims to either one of three lawyers who had represented them in certain litigation. Samuel notified Charles of William's proposal, and a short time thereafter Samuel informed William that they were willing to submit the matters in dispute to Dee R. Jones and, in accordance with an arrangement between William and Samuel, William was to see Jones and ascertain when he could hear the matter. This was done. William reported to his brother that Jones would hear them on a certain date. On the day fixed the two brothers and Charles Beuoy, representing his wife, met with Jones, and the parties stated their contending claims to him. Mr. Beuoy at the time said that he was representing his wife,

and he presented her claims against the appellee, and took a very active part in the general discussion relative to the claims of his wife and of William. In his talk and statement when they were giving their statements to Jones, he would refer to the claims of William as if they were claims against himself instead of against his wife, as is evidenced by such remarks as, "I don't think I am morally bound,"; "I am certain I am not legally bound." At times when they were going over their respective claims before Jones, Charles became quite emphatic in relation to what he thought about some of the items, and said he never would consent that he or his wife should pay more than a certain share of some claims, and possibly none of others. The parties met with Jones about ten o'clock a. m., talked their matters over with Jones until noon, adjourned and returned in the afternoon. It took about four hours to go over the matter with Jones. When they finished, Jones informed them that it would take him at least two weeks to decide the questions; that he had to look up some law and study the facts; that when he decided it, he would send each of them a copy of his decision, which he did. Mr. Beuoy on receiving the copy of the award was not satisfied with it. He informed his wife about the award and acquainted her with its contents. With the knowledge of his wife, he wrote to Jones criticizing the award, and sent Jones a check for their share of the costs. He received another letter from Jones, which he answered. Mrs. Beuoy was present when this letter was answered, and was kept informed as to the contents of the letters from Jones, and those which her husband wrote to Jones. She was present during the trial of this cause, but did not take any

part in the management of the defense or testify as witness. We are of the opinion that the evidence is sufficient to sustain the court in finding that Charles T. Beuoy had authority from his wife to enter into and make an agreement to arbitrate.

The contention of appellants that the findings of the court are contrary to law is based upon the theory that the disputes and controversies grew out of the final settlement of the Milhollin estates and the partnership of Nathan Milhollin and sons, and that these claims and controversies were barred by the judgments made and entered in the final settlement of said estates and partnership, and were for that reason not subject to arbitration. We held otherwise in ruling upon the demurrer to the complaint, and need not enter into a further discussion of that subject.

Appellants also contend that the court erred in allowing the award to be admitted in evidence, in permitting the arbitrator Jones to relate what

4-5. was said and done by himself and parties at the time of the hearing of the disputes and controversies, and in permitting Jones to testify what he charged the parties for his services as arbitrator. There was no error in the introduction of any of this evidence. The award was the foundation of the cause of action and was properly admitted in evidence. The appellants have pointed out no particular objections to the testimony of the witness Jones, and we see no objection to it. The same facts were proved without objection by three other witnesses. There was no error in overruling the motion for a new trial.

Judgment affirmed.

Nichols, J., not participating.

PUBLIC UTILITIES COMPANY v. READER, ADMINISTRATOR.

[No. 9,687. Filed February 21, 1919. Rehearing denied April 24, 1919. Transfer denied November 26, 1919.]

1. **APPEAL.—Briefs.—Propositions.—Points.**—Assignments of error unsupported by propositions or points are waived. p. 488.
2. **APPEAL.—Assignment of Error.—Constitutional Questions.**—An assignment of error that the statute upon which the complaint is based is unconstitutional, is not proper and presents no question. p. 489.
3. **COURTS.—Precedents.—Jurisdiction of Appellate Court.**—The constitutionality of the Employers' Liability Act of 1911 having been determined by the Supreme Court, that question cannot be raised in the Appellate Court, the decision of the Supreme Court being conclusive. p. 489.
4. **COURTS.—Jurisdiction.—Recognition by Party.**—It would seem that taking an appeal to the Appellate Court recognizes the settlement of constitutional questions upon any statute involved, to the extent that they have been passed upon by the Supreme Court. p. 489.
5. **MASTER AND SERVANT.—Injuries to Servant.—Jury Question.—Evidence.**—In an action for the death of a motorman, held that, in view of §2, Acts 1911 p. 145, §8020b Burns 1914, and there being a complication of facts and a difference of opinion as to the inferences derivable therefrom, the question of decedent's negligence was for the jury, under the principles of the common law as well as by the express provision of §7 of the act. p. 489.
6. **APPEAL.—Review.—Evidence.**—It is not the province of the Appellate Court to weigh the evidence when it was sufficient to justify the submission of the cause to the jury. p. 495.
7. **NEW TRIAL.—Correct Result.—Faulty Instructions.**—Where the verdict is right according to the principles applicable to the facts, it is not contrary to law though it may be contrary to some instruction given, since the instruction may be wrong. p. 495.
8. **APPEAL.—Exceptions.—Sufficiency.**—An exception to the refusal to give "certain of the instructions requested" is joint and so indefinite as to present no question. p. 496.

From Posey Circuit Court; *Herdis Clements*, Judge.

Action by Matilda J. Reader, administratrix of the estate of Henry Reader, deceased, against the Public Utilities Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. D. Robinson, W. E. Stilwell and G. V. Menzies, for appellant.

John R. Brill, F. H. Hatfield and John W. Brady, for appellee.

NICHOLS, J.—This action was brought in the Posey Circuit Court by appellee against the appellant for damages for the death of her husband, Henry Reader, resulting from the negligence of the appellant. Originally there were two paragraphs of complaint, but, before the trial, the first paragraph was dismissed. There was a demurrer to the second paragraph of the complaint, which was overruled. The appellant answered in general denial, and the cause was submitted to a jury for trial. There was a general verdict for the appellee. Interrogatories were submitted to and answered by the jury. Appellant moved the court for judgment in its favor on the answers to interrogatories notwithstanding the general verdict. This motion was overruled, to which ruling appellant excepted. After motion for a new trial, which was overruled, to which ruling appellant excepted, this appeal is prosecuted.

After general averments as to the appointment of administratrix, and the location of appellant's line of railroad, the complaint avers in substance that on September 3, 1914, appellant was operating its cars from the city of Evansville to the city of Princeton,

thereby passing Baldwin Heights station, near which point there was a switch on which cars were run to permit other cars to pass; that one of the appellant's cars being so operated was, at the time of the accident involved, being run by appellee's decedent under the direction and control of one J. C. Miller, as conductor, then in the employ of the appellant; that said conductor, J. C. Miller, was in full charge and control of the movements of said car and, under the rules and regulations of said appellant, it was the duty of said conductor to, and he did, give to said motorman the bell signals, indicating whether to go forward, back, or stop the car, which rule of said appellant both the motorman and conductor were bound to and did obey; and under the terms of employment of said decedent, as such motorman, he was required to and did conform to and obey all the bell signals and orders given him by said conductor; that said car being run by said decedent, as motorman, left Princeton, running south about six o'clock, in charge and control of said conductor; that said decedent, in obedience to an order given him by said conductor, ran said car on the switch at Baldwin Heights, for the purpose of permitting a northbound car to pass; that immediately after said northbound car passed, said conductor, by and through said bell system, negligently ordered and directed said decedent to run the car off said switch, and onto the main track, which said decedent did, and thereupon said conductor negligently ordered and directed the decedent to run the car south on the main line, which order the decedent obeyed; that a short distance south from Baldwin Heights there was an abrupt and sharp curve in the main track and an elevation, which pre-

vented the motorman approaching said curve from either north or south from seeing the car approaching in the opposite direction, and that appellee's decedent approached said curve and suddenly came in contact with a car approaching the curve from the opposite direction, which car was being operated by the defendant company; that appellee's decedent did not know of the approach of the car on account of the curve and elevation, and could not see the same in time to avoid a collision; that such collision was with great force and violence and resulted in the death of the appellee's decedent; that the appellant was guilty of negligence in giving to appellee's decedent said orders to run this car onto the main track, and thereafter forward to the south on the main track, which said negligence resulted in the collision aforesaid.

The appellant relies upon the following errors for reversal: (1) Overruling appellant's demurrer to the second paragraph of complaint; (2) overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict; (3) that the statute upon which the second paragraph of the complaint is based is unconstitutional; (4) that the court erred in overruling appellant's motion for a new trial.

The first and second assignments of error are waived by appellant's failure to support either of them by its propositions or points. *Hoover v.*

1. *Weesner* (1897), 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; *Chicago, etc., R. Co. v. Ader* (1916), 184 Ind. 235, 110 N. E. 67; *Indianapolis Traction, etc., Co. v. Miller* (1913), 179 Ind. 182, 100 N. E. 449; *Kingan & Co. v. King* (1913), 179 Ind. 285, 100 N. E. 1044; *Ewbank's Manual* §188.

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The third assignment is not a proper one, and presents no question. *Pittsburgh, etc., R. Co. v. Town of Wolcott* (1904), 162 Ind. 399, 69 N. E. 451; 2-4. *Standish v. Bridgewater* (1902), 159 Ind. 386, 65 N. E. 189; *Pittsburgh, etc., R. Co. v. Collins* (1907), 168 Ind. 467, 80 N. E. 415. Further, the constitutionality of the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, which is involved in the third assignment of error, has been conclusively and repeatedly established by the Supreme Court. *Standard Steel Car Co. v. Martinecz* (1918), 66 Ind. App. 672, 113 N. E. 244, 114 N. E. 94; *American Car, etc., Co. v. Williams* (1916), 63 Ind. App. 1, 113 N. E. 252; *Nordyke & Marmon Co. v. Hilborg* (1916), 62 Ind. App. 196, 110 N. E. 684; *Vandalia R. Co. v. Stillwell* (1914), 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D 258. The constitutionality of this act having been determined by the Supreme Court, such question cannot be raised in the Appellate Court. The decision is binding upon the Appellate Court, and it would seem that appellant's counsel has recognized this principle of law by taking this appeal to the Appellate Court. *Pittsburgh, etc., R. Co. v. Peck* (1909), 172 Ind. 562, 88 N. E. 939; *Blair v. City of Fort Wayne* (1912), 51 Ind. App. 652, 98 N. E. 736.

Under the fourth assignment of error, the appellant earnestly insists that the verdict of the jury is contrary to law, not only because the verdict is

5. not sustained by sufficient evidence, but also because it is directly contrary to law as expressly given to the jury by the court in the instructions read to the jury. Appellant insists that the evidence shows very clearly that the conductor was not in charge of the car, and that the motorman was not

bound to obey the signal of "two bells" to go forward when given by the conductor, and that there is no evidence in the record from which there can be any inference drawn that the conductor was in charge of said car, and that the said decedent was bound to obey any order given him to start the car forward. Appellant further contends that there is no legitimate evidence in the record from which it can be said that the decedent received the signal from the conductor to proceed southward from Baldwin Heights; and that, unless it can be shown that there is evidence to show that the decedent was bound to obey the conductor, and that in consequence of his obedience his death resulted, the appellee cannot recover under any construction to be given to the statute involved.

It appears from the evidence that the decedent, at the time of the accident, was operating car No. 17, extra, as a motorman, leaving Princeton at 6:01 p. m., and running south to Baldwin Heights, at which place, by the dispatcher's orders, the car was to take the siding to meet extra No. 205, running north; that a copy of this order was furnished to both the decedent and the conductor; that while said car was on the switch, a car passed going north. It is not disclosed whether this was a regular car or an extra, but it is disclosed by the evidence that the regular car was due to pass Baldwin Heights going north at 6:12 p. m. Immediately after said car passed, the decedent tapped his gong twice, to which the conductor answered with two bells. Thereupon the decedent pulled his car out onto the main line, and a Mr. Gray, who was a conductor and an employe of the defendant company, but a passenger and not on duty on this car, threw the switch and lined it up with the

main line, and then got on the back step and whistled twice, after which the conductor sounded the bell twice, and the car went forward to the south. That the service performed by Mr. Gray was the duty of the conductor, and was not the decedent's duty. That the conductor heard the whistle by Mr. Gray, and understood that the sounding of the gong by the motorman meant that everything was all right and that he wanted to go ahead and answered by ringing two bells. That these two bells were in response to the sounding of the gong. That it was the rule and custom for the conductor to sound the bell twice to notify the motorman that he was on the car. The conductor testified that if Gray had not been there he would have thrown the switch, and that the signal that he gave the motorman was the usual and ordinary signal that whoever threw the switch was back on the car, and that it had nothing to do with the movement of the car. The conductor further testified that a Mr. Parker, the general superintendent of appellant company, while at Princeton, where the orders aforesaid were issued, held up two fingers and said, "Remember! Boys, you meet two cars at Baldwin Heights," and that Mr. Parker and the conductor and the decedent were all there together when Mr. Parker made the statement. It appears by the evidence that the decedent had in his possession and control a book of rules of the appellant, which contains the following:

(10) "In addition to the rules contained in the book, bulletins and time tables will be issued from time to time and that such special instructions, when issued by proper authority, shall be fully observed while in effect, whether they con-

flict with these rules or not. That employees must be conversant with and obey the rules and special instructions.

(4) "Employees must provide themselves with a copy of the current time table and always have the same with them when on duty.

(8) "Each employee is expected to and required to look after and be responsible for his own safety as well as to exercise care and avoid injury to others.

(99) "Motormen must not start their trains without first receiving proper signals from the conductor, and never start without the signal being correct."

The only starting signal mentioned in the rules, as far as is disclosed by the evidence, is the signal of "two bells." This signal is provided for in the book of rules as follows:

"Conductor, to Motorman—

"Signal,—Two Bells or whistle cord signals.

"Indication,—When train is standing, start forward."

(155) "Regular trains in either direction will meet trains as per time table unless otherwise ordered by the proper authority.

(157) "Extra trains are inferior to regular trains of whatever class, and have no rights except those conferred upon them by train orders.

(169) "Extra trains must not be run without orders from the dispatcher.

(210) "For the movement of trains not provided for by the time table, train orders will be

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issued by authority over the signature of the Superintendent or other designated authority.

(228) "When one train reaches the meeting point and finds that the train or trains to be met have not arrived, the conductor shall immediately call the dispatcher's office for orders."

In addition to these rules the following special rules appear upon the time table, to wit:

"(9) When approaching a siding at which trains are to meet or pass, the conductor will remind the motorman that it is a siding for his train to meet or pass another train by giving the proper stop signal; and the train will not pass the meeting or passing point until the proper signal has been given by the conductor.

"(23) After any train clears the main track and the switches are properly set and locked for the main track, the conductor must step to the side of the track opposite the switch stand and remain there until the opposing train is met or passed."

Mr. Parker, appellant's general superintendent, testified that, when the car is standing, two bells is the conductor's signal to the motorman to go ahead if all is well in front, that it is not in the printed rules in these words, but that is the understanding. He further testified that rule No. 2 provides:

"In addition to these rules bulletin orders and time tables will be issued from time to time containing such special instructions as necessity demands. These special instructions, when issued by proper authority, shall be fully observed while

in effect, whether in conflict with these rules or not.”

The rule book contains all the rules of the company, except the special rules on the time card, and the latter rules supersede those in the book.

When the car on which appellant's decedent was motorman reached Baldwin Heights the cars to be met at that point had not arrived, and it was then the duty of the conductor, under rule No. 228, immediately to call the dispatcher's office for orders. This duty, in the absence of evidence to the contrary, the conductor is presumed to have performed. The jury may reasonably have inferred that when the decedent received the proceed signal from the conductor, as provided in special rule No. 9, he believed, and had reason to believe, that the conductor had called the dispatcher and had received an order to proceed.

Section 2 of the Employers' Liability Act, *supra*, upon which the second paragraph of the complaint is based, provides, with other things, that no such injured employe shall be held to have been guilty of negligence or contributory negligence where the injury complained of resulted from such employe's obedience or conformity to an order or direction of the employer or of any employe to whose orders or directions he was under obligation to conform or obey, although such order or direction was a deviation from other rules, orders, or directions previously made by such employer.

In view of this statutory provision, and with the complication of facts as appears from the brief statement thereof above, and where there is a difference of opinion as to the inferences that may be drawn

from them, the question whether the appellee's decedent was negligent was properly submitted to the jury. We reach this conclusion, as a principle of common law, without reference to §7 of the Employers' Liability Act, *supra*, which provides that all questions of negligence or contributory negligence shall be questions of fact for the jury to decide. *Chicago, etc., R. Co. v. Hamerick* (1912), 50 Ind. App. 425, 96 N. E. 649; *Norris v. Illinois Central R. Co.* (1899), 88 Ill. App. 614; *Carson v. Southern Railway* (1903), 68 S. C. 55, 46 S. E. 525; *Cincinnati, etc., R. Co. v. Lang, Admx.* (1889), 118 Ind. 579, 21 N. E. 317; *Hurlbut v. Wabash R. Co.* (1895), 130 Mo. 657, 31 S. W. 1051.

The cause having been properly submitted to the jury, and the jury having weighed the evi-

6. dence, which is not the province of this court, we hold that the verdict is sustained by sufficient evidence.

Appellant contends that the verdict is contrary to law, because it is directly contrary to the law as expressly given to the jury by the court, in the

7. instructions read to the jury; and that a verdict rendered contrary to the law, as ascertained in an instruction to the jury by the court, will be set aside, whether the instruction is right or wrong. A number of authorities are cited to sustain this proposition, none of which are from Indiana. This is certainly not the law of this state. It has been expressly so held that it is not, with the statement that the instructions themselves may be wrong, and that if the jury nevertheless decide the case right according to the principles applicable to the facts, the verdict cannot be said to be contrary to law. *Pittsburgh, etc., R. Co. v. Ives* (1895), 12 Ind. App. 602, 40 N. E. 923.

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Appellant predicates error upon the refusal of the court to give instructions numbered respectively, 2, 11, 13, 14, 17 and 26, of the twenty-six instructions tendered by the appellant. The following is a copy of the exception by the appellant to the court's refusal to give its instructions, as the same appears in its brief: "Appellant excepted to the refusal of the court to give certain of the instructions requested by the appellant." Such an exception is joint, and is so indefinite as to present no question. *Doehring v. Hollenbeck* (1915), 58 Ind. App. 80, 104 N. E. 770.

The judgment is affirmed.

PFAFFLIN v. SCHMIDT, ADMINISTRATOR.

[No. 10,048. Filed December 9, 1919.]

1. **APPEAL.—Findings.—Failure to Challenge.—Admissions.**—Failure to challenge the correctness of facts as found is an admission that the finding is correct and supported by the evidence. p. 504.
2. **CONTRACTS.—Rescission.—Question of Fact.**—Rescission is a question of fact. p. 504.
3. **TRIAL.—Findings.—Facts Not Found.—Presumption.**—As to facts not found in a special finding of facts, it is conclusively presumed that they have not been proved. p. 504.
4. **VENDOR AND PURCHASER.—Contract for Sale of Land.—Rescission.—Burden of Proof.**—In an action to recover money paid on the purchase price of real estate based on an alleged rescission of the contract involved, the burden is on the plaintiff to prove such rescission. p. 504.
5. **VENDOR AND PURCHASER.—Real Estate Contract.—Vendor Ready, Able and Willing to Perform.—Action for Money Paid on Price.—Rescission.**—In an action based on alleged rescission of a contract

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for the purchase of real estate, to recover money paid on the purchase price, a finding that the vendor and his administrator and heirs had always been ready, able and willing to carry out the contract, is an indirect finding against the plaintiff on the question of rescission. (*Dantzetser v. Cook*, 40 Ind. App. 65, distinguished.) p. 504.

6. VENDOR AND PURCHASER.—*Nonperformance by Purchaser.—Remedies of Parties.*—Where, in an action to recover purchase money paid because of an alleged rescission, the facts fail to show any rescission at the time the action was begun, on account of the continuous readiness, ability and willingness of the vendor to convey upon payment of the balance, it does not follow that the vendor is entitled to hold the money paid and the title also, free from any claim of the purchaser: but the latter would have the right, any time before the vendor agreed to a rescission, to tender the balance due, demand a conveyance, and upon refusal, sue for the money paid; while the vendor, upon failure by the purchaser to perform upon demand or within a reasonable time, has the right to sue for specific performance, or to treat the contract as rescinded and sue for damages for its breach, or to foreclose the equity of the purchaser in the real estate. p. 505.

From Marion Superior Court (97,552); *V. G. Clifford*, Judge.

Action by Herman J. Pfaffin against Charles L. Schmidt. On defendant's death Adolph Schmidt was substituted as his administrator. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

John W. Holtzman, Louis A. Coleman and John J. Kelley, for appellant.

Gavin & Gavin, for appellee.

McMAHAN, J.—The appellant brought this action against Charles L. Schmidt to recover \$1,200 paid by appellant upon a contract of sale of certain real estate. Pending suit and before trial, Charles L. Schmidt died and the appellee as his administrator was substituted as defendant. The complaint was in

one paragraph for money had and received. There was a trial by the court. On request of the parties, the court found the facts specially and stated its conclusions of law thereon.

The facts as found by the court are as follows: On July 11, 1912, the appellant and Charles L. Schmidt entered into a contract whereby said Schmidt agreed to sell and convey certain real estate to appellant for the sum of \$3,675, the purchase price to be paid \$1,200 cash and the balance with interest on or before six months. The contract provided that said Charles L. Schmidt should on demand furnish an abstract of title showing fee-simple title free and clear of all incumbrances except taxes for 1912. Appellant paid said \$1,200, which was the only payment ever made by him under said contract, and the said sum had never been repaid to him; that at the time of the execution of said contract Charles L. Schmidt was the owner of said real estate in fee simple. In November, 1914, he and his brother, Adolph Schmidt, who is now the administrator of the estate of said Charles, executed and delivered to Christina Schmidt a warranty deed for a number of tracts of land, including that described in said contract, which deed was recorded in the recorder's office of Marion county, Indiana. Charles L. Schmidt at the time of the execution of said contract, and at the time of the execution of said deed to Christina Schmidt, and at the time of his death, was unmarried. There was no consideration paid for the execution of the deed by Charles L. and Adolph to Christina Schmidt, but Christina verbally agreed to protect and carry out the contract made between appellant and Charles L. Schmidt. Sometime in the fall of 1912, Emma Pfaf-

fin, wife of appellant, advised Charles L. Schmidt that her husband was ill and would be unable to carry out said contract, and said Charles L. Schmidt thereupon stated to Mrs. Pfaffin that, if that was the case, and he sold the property, he would be willing to pay back the \$1,200 with interest. In December, 1914, appellant, by his attorney, demanded of Charles L. Schmidt that he repay said \$1,200 with interest, which demand was refused. Charles L. Schmidt died on February 6, 1915, intestate, and left as his sole and only heirs at law Minnie A. Claffey, Louis, Edward H., Christina and Adolph Schmidt. Adolph Schmidt was appointed administrator of the estate of Charles L. Schmidt in February, 1916, by the probate court of Marion county, Indiana, and at the time of the trial was the duly qualified and acting administrator of said estate. Said estate is solvent, and all the debts and claims against the same have been paid with the exception of the claim in controversy. Christina Schmidt, on January 15, 1915, reconveyed the real estate mentioned in the contract to Charles L. Schmidt, who thereafter until his death held the legal title thereto. This action was commenced on January 18, 1915. Neither Charles L. Schmidt in his lifetime, nor his administrator or heirs, after his death and prior to the time this cause was submitted to the court for trial, ever tendered appellant an abstract of title or deed for said real estate, nor did the appellant nor any one on his behalf ever make a demand of Charles L. Schmidt or his heirs or administrator for such deed or abstract. Upon the trial of this cause, the appellee as administrator tendered to appellant in open court a warranty deed executed by all of the heirs of Charles L. Schmidt conveying to

appellant the property described in said contract and demanded payment of the purchase money, but said deed was not accepted, nor was the balance of the purchase money paid. Charles L. Schmidt at all times prior to his death was, and Adolph Schmidt as administrator of his estate together with all his heirs ever since his death were, ready, willing and able to convey said real estate to the plaintiff upon the payment of the balance of the purchase money. Upon these facts the court concluded as a matter of law that appellant take nothing. Judgment was rendered accordingly.

Appellant contends that the conveyance by Charles L. Schmidt to Christina Schmidt was an election on his part to rescind the contract, and that appellant when he demanded the return of the \$1,200 treated the contract at an end and acquiesced in the rescission, and on the facts found is entitled to a judgment for the \$1,200 and interest. In support of this contention appellant cites and relies on *Dantzeiser v. Cook* (1872), 40 Ind. 65; *VanAbel v. Wemmering* (1914), 33 S. D. 344, 146 N. W. 697; *James v. Burchell* (1880), 82 N. Y. 108, and *Pierce v. Staub* (1906), 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785, 112 Am. St. 163.

In *Dantzeiser v. Cook*, *supra*, the question arose upon demurrers to the complaint and answer. Dantzeiser and Cook in April, 1868, entered into a contract wherein the former agreed to sell and convey certain real estate to the latter of \$2,200. The purchaser paid \$200 cash and took a bond for a deed upon payment of the balance of the purchase price. In July, 1868, the purchaser paid an additional \$65 on the purchase price. In November, 1869, Dantzeiser sold, and by

warranty deed conveyed the land to a third party. The complaint was by the purchaser, Cook, to have the contract declared and adjudged rescinded, and to recover the amount paid on the contract. The answer admitted the execution of the contract, and alleged that in October, 1869, the seller notified Cook that he was then ready to execute the deed, and demanded payment of the balance of the purchase price; that Cook refused to pay the balance due, saying that he, Cook, could use his money to better advantage in buying other land, that he would not accept a deed, and that he, Dantzeiser, need not make one.

Dantzeiser thereafter made an actual sale of the land to a third party and put it out of his power to carry out his contract with Cook. He deliberately sold the land with the intention and evident understanding that the title thereto should vest in his grantee. After such sale he was never ready, able or willing to convey the land to Cook. The court in the case just cited held that Dantzeiser by such sale concurred and acquiesced in the rescission of the contract, and that, the contract having been rescinded, the purchaser was entitled to recover back what he had paid. In discussing the question, the court cited with approval *Hansbrough v. Peck* (1866), 5 Wall. 497, 18 L. Ed. 520, wherein the court said: "No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refused to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

Dantzeiser had disabled himself by conveying the property to another, while in the instant case the court finds as a fact that Charles L. Schmidt, his administrator, and heirs, have at all times been "ready, willing and able to convey said real estate," upon payment of the purchase money.

James v. Burchell, supra, was an action brought to recover damages for the alleged failure of Burchell to perform a contract. Mrs. James, who was the owner of four certain lots in the city of New York, agreed to sell them to Burchell for \$11,000 each; the purchaser was, within twenty days after the making of the contract, to commence the erection of a house upon each of said lots, each house to cost about \$15,000. Said houses were to be completed within seven months. The vendor was to advance \$4,000 on each house to aid in its erection, and was given the right to execute a mortgage upon each lot to the amount of \$15,000, and to convey same subject to said mortgage, in lieu of purchase money for the same amount. On the day this contract was executed Mrs. James conveyed said real estate to a third party subject to no incumbrance whatever. Butchell did not take possession under the contract and refused to erect the buildings for the reason that Mrs. James could give no valid title to the property. The court held that it was apparent from the terms of the contract that the purchaser relied on the present responsibility of Mrs. James, and, in the faith of an existing and perfect title in her, he was to take possession, erect valuable buildings and expend large sums of money; that the covenant that Mrs. James was the owner of the fee and the permission given her to mortgage were not only inducements for the expenditure of \$60,000 by

the purchaser, but was a guaranty that no other incumbrances should be placed upon the property; that the title under the terms of the contract should remain in Mrs. James until the conveyance was delivered to the purchaser, and that the expenditures should not, under the peculiar provisions of the contract, be regarded as ordinary payments on account of the purchase money.

In *Van Abel v. Wemmering, supra*, the purchaser had expressed a desire to be released from the contract, and upon tender of a deed and demand refused to perform the contract. The next day the vendor placed a mortgage on the lands, and later brought an action for specific performance. The court there simply held that: "Where the vendee gives notice, or by his acts indicates, that he will not be bound by the contract, and the vendor thereafter gives notice, or by his conduct performs acts inconsistent with his equitable right to enforce such contract, it will be deemed abandonment of strict equitable performance by both parties, so as to defeat specific performance." To which the court added the following statement: "No opinion is herein expressed as to the legal rights of the parties in relation to said contract. The views herein expressed relate solely to the right and remedy of specific performance as applied to the particular circumstances of this case."

In *Pierce v. Staub, supra*, the court held that there had been a rescission, and that the purchaser was entitled to recover back what he had paid. The court there announced the rule to be: "That a party who advances money in part performance of a contract and then stops short and refuses to go on, while the other remains ready and willing to perform,

cannot recover back the money advanced.” The vendor there claimed that the amount paid on the purchase price, amounting to over \$60,000 had been forfeited and that he was entitled to both the land and the \$60,000, which he had received on the contract. The court held that, under a statute of Connecticut, the case must be decided according to the rules of equity, rather than by the rules of law, and that, under the facts in the case, the purchaser was entitled to recover back what he had paid.

In the instant case, we are dealing with a special finding of facts, in which the facts differ materially from the facts in the cases cited by appellant.

The appellant, by failing to challenge the correctness of the facts as found by the court, admit that they are correctly found, and that they are

1-4. supported by the evidence. In construing a special finding of facts, facts necessary to entitle the plaintiff to recover, and which are not found, are conclusively presumed not to have been proved. The burden was on appellant in this case to prove as a fact that the contract in question had been rescinded. Rescission is a question of fact. *Gwynne v. Ramsey* (1884), 92 Ind. 414; *Cromwell v. Wilkinson* (1862), 18 Ind. 365; *Fruits v. Pearson* (1900), 25 Ind. App. 235, 57 N. E. 158; *Goodman v. Haynes Automobile Co.* (1913), 205 Fed. 352, 123 C. C. A. 480. “It is a question for the jury whether the contract has been rescinded by the purchaser.” 39 Cyc 2122.

Without any finding of rescission, as in the case here, appellant must fail. The finding that Charles L. Schmidt, his administrator, and heirs, have

5. “always been ready, willing and able to carry out the contract of sale,” is an indirect finding against appellant upon the question of rescission.

Pfaffin v. Schmidt, Admr.—71 Ind. App. 496.

This is not a case where the seller is attempting to retain both the money paid on the contract and the real estate, and we are not to be understood

6. as holding that the appellee is entitled to retain the \$1,200 paid by appellant, and hold the title to the real estate free from any claim of appellant. What we hold is that, under the facts as found by the court, appellant failed to show that there was a rescission of the contract at the time this action was commenced. Under the facts as found by the court, appellant would have the right, any time before appellee acquiesced in or agreed to a rescission of the contract, to tender appellee the amount due on the contract, and demand a conveyance, and, upon a refusal to make such conveyance, to maintain an action to recover the amount of the purchase price paid. The appellee, upon failure of the appellant to perform upon demand or within a reasonable time, has the right to prosecute his action for specific performance, or he may treat the contract as rescinded, and bring his action against appellant for damages for breach of contract or to foreclose appellant's equity in said real estate.

It has been held that, where a party fails within a reasonable time to take affirmative action to default the other, rescission as a fact may be inferred. *Weitzel v. Leyson* (1909), 23 S. D. 367, 121 N. W. 868; *Handel v. O'Kelly* (1912), 22 Manitoba 562. The court did not err in its conclusions of law.

Judgment affirmed.

CHESAPEAKE AND OHIO RAILWAY COMPANY v. PERRY.

[No. 9,983. Filed December 9, 1919.]

1. **RAILROADS.—Crossing Accidents.—Evidence.—Sufficiency.**—In an action for damages sustained by a girl seventeen years of age, by being struck by a train while driving a buggy over a crossing, a verdict for the plaintiff is binding upon the Appellate Court upon the questions of negligence, contributory negligence and proximate cause, where there is evidence that the engineer cut off steam some distance away and approached the crossing at thirty to thirty-five miles an hour, that the statutory crossing signals were not given, that an electric gong at the crossing did not ring and was and for some time had been in bad working order, that the view in the direction of the approaching train was obstructed, that the girl approached the crossing at a reasonable rate of speed, looking and listening continuously for the approach of a train in either direction and for signals thereof, that she knew of said gong and observed it was not ringing, but did not fully rely upon that and continued to look and listen for other signals of an approaching train, but neither heard nor saw any nor discovered the approach of the train until her horse was entering on the track, when she made a vain effort to avoid the collision. p. 508.
2. **APPEAL.—Briefs.—Instructions.—Review.**—The Appellate Court is not required to consider alleged errors in refusing instructions on which no proposition or point is stated in the brief. p. 511.
3. **TRIAL.—Instructions.—Refusals Covered by Instructions Given.**—It is not error to refuse to give instructions covered by other instructions given. p. 511.
4. **TRIAL.—Instructions.—Refusal of Inaccurate Instruction.**—In a crossing accident case reversible error cannot be predicated upon the refusal to instruct that the injured person "saw whatever she might have heard had she listened," in view of the inaccuracy in the statement. p. 511.
5. **APPEAL.—Review.—Instructions.—Exceptions.**—Where the record fails to show that any exception was taken to the refusal of a requested instruction, the error, if any, is not available on appeal. p. 511.
6. **APPEAL.—Assignment of Error.—Motion for Judgment on Answers to Interrogatories.—Motion for New Trial.**—A ruling on a motion for judgment on the answers to interrogatories is not ground for new trial, but may be assigned independently as error on appeal. p. 511.

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7. **RAILROADS.**—*Crossing Accident.*—*Contributory Negligence.*—*Ability to Hear Train Immediately Before Entering Upon Track.*—*Answers to Interrogatories.*—A verdict for the plaintiff in a crossing accident case is not overthrown by an answer to an interrogatory that if the injured person had listened she could have heard the train coming immediately before she drove on the crossing, since the general verdict is taken as a finding that she could not have heard the noise of the train in time to have avoided injury. p. 511.
8. **RAILROADS.**—*Crossing Accident.*—*Warning.*—*Negligence.*—*Evidence.*—*Admissibility.*—In a crossing accident case, under proper averments in the complaint, evidence that an electric gong at the crossing, designed and placed to give warning of the approach of trains to the crossing, was out of repair five or six days before the accident, is admissible to show that the gong had been out of order for such a length of time that defendant, by the exercise of ordinary care, might have had it repaired. p. 513.
9. **TRIAL.**—*Evidence.*—*Limiting by Instruction.*—*Necessity for Request.*—Where evidence is admissible under the issues for any purpose, defendant, if desiring to guard against an improper application thereof by the jury, should ask for an instruction limiting such evidence to its legitimate scope. p. 513.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by Aaron W. Perry against the Chesapeake and Ohio Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Harry C. Starr, Warner & Warner and *John F. Robbins*, for appellant.

Wilbur Ryman, for appellee.

BATMAN, J.—This is an action by appellee against appellant to recover damages sustained by him, by reason of personal injuries to his minor child, Valley M. Perry, alleged to have been inflicted on account of the negligence of appellant. The complaint alleges, and the evidence establishes, the following general facts: That a public highway known as Sycamore

street extends north and south through the east part of Gaston, in Delaware county, intersecting practically at grade appellant's railroad in the southeast part of the town. The railroad extends in a general direction of southeast and northwest. On June 30, 1913, appellee's daughter, then seventeen years of age, was driving a horse and buggy south along said highway. As the horse which she was driving entered upon the crossing, one of appellant's trains, approaching from the southeast, collided with the horse and buggy, hurling appellee's daughter from the latter, and inflicting upon her serious injuries. After issues were joined on the complaint, the cause was submitted to a jury for trial, resulting in a verdict in favor of appellee. The jury also returned with its general verdict its answers to certain interrogatories submitted by the court. Appellant filed its motion for judgment on the answers to the interrogatories notwithstanding the general verdict, which was overruled. It also filed its motion for a new trial, which was likewise overruled. Judgment was thereupon rendered in favor of appellee for \$1,000 and costs.

The only error assigned by appellant and not waived by a failure to state any proposition or point with reference thereto relates to the action of

1. the court in overruling its motion for a new trial. Under this motion appellant challenges the sufficiency of the evidence on the issues of negligence, contributory negligence, and proximate cause. While the evidence is not without contradiction on the question of appellant's negligence, still we are of the opinion that there is ample evidence to warrant the jury in finding that appellant failed to

cause the signals required by §5431 Burns 1914, §4020 R. S. 1881, to be given, as alleged in the complaint.

The record discloses substantial evidence of the following facts, pertinent to the issues of contributory negligence and proximate cause: That north of appellant's railroad track, and east of Sycamore street, there was a two-story canning factory, commencing about ten feet east of said street and thirty feet north of said railroad track, and extending eastward, almost parallel with said railroad for a distance of about 100 feet; that north of the canning factory there was a creamery building, with a driveway extending between it and the canning factory; that north of the creamery for a distance of several hundred feet there were a number of residences, barns and out-buildings and also orchards in full foliage; that, between the canning factory and the main line of appellant's railroad, there was a switch on which stood a box car at the time of the accident in question; that at one point the canning factory was in a very few feet from the north rail of said switch; that three small trees with branches in full leaf stood near said street between the canning factory and appellant's railroad track; that one of said trees was at the end of said switch near Sycamore street and some of its leafy branches extended toward said railroad track; and that all of said objects were obstructions to the vision of any one looking eastward along the line of said track, while approaching said railroad crossing from the north on Sycamore street; that, on the west side of said street and near the railroad track, there was located on a post an electric gong, designed to ring automatically while a train was moving or standing at the crossing, or within a dis-

tance of several hundred feet east or west therefrom, but that it did not always work as designed, in this, that sometimes it did not ring as a train was approaching or passing the crossing, and that at other times it would continue to ring long after a train had passed; that appellee's said daughter knew of the presence and purpose of said gong, but there is no evidence that she knew that sometimes it failed to operate as designed; that on the occasion in question she approached the crossing from the north on Sycamore street in a buggy, traveling at a reasonable rate of speed; that in so doing she continuously looked and listened carefully for the approach of a train from either direction, but that she did not discover the train in question until the horse which she was driving was in the act of entering on the main track of appellant's railroad at said crossing; that on discovering the approach of said train she made an effort to avoid a collision therewith, but failed, and as a result received serious injuries. There was evidence that the statutory signals designed to give warning of the approach of trains at public crossings were not given on this occasion, and that said electric gong did not ring; that appellee's said daughter listened for said signals and the ringing of said gong, but did not hear the same; that as she approached the crossing she had the presence of said gong in mind, and observed that it was not ringing; that she did not fully rely on that fact, but continued to look and listen for other signals of an approaching train, but neither saw nor heard any. There was also evidence that the engineer had cut off the steam some distance east of the crossing on Sycamore street, and that the train approached said crossing at a speed

of about thirty or thirty-five miles an hour. In view of the evidence, which tends to establish these facts, we are bound by the determination of the jury on the question of contributory negligence and proximate cause. *Chesapeake, etc., R. Co. v. Perry* (1918), 66 Ind. App. 532, 118 N. E. 548, and cases there cited.

Appellant, in its motion for a new trial, has alleged that the court erred in refusing to give a number of instructions requested by it, but we are only 2-5. required to consider those numbered 4, 16, 17, 26, 29, 32 and 38, as they are the only ones on which appellant has stated any proposition or point in its brief. There was no error in refusing to give said instructions 4, 16, 26, 29, 32, and 38, as each of them were sufficiently covered by other instructions given by the court. There was no error in refusing to give said instruction No. 17, as it states that the law presumed that Valley M. Perry, when she approached and was about to cross appellant's railroad track, "saw whatever she might have heard had she listened." This inaccurate statement is probably the result of inadvertence, but we must accept the instruction as it appears in the record. By reason of this statement, reversible error cannot be rightfully predicated on its refusal. Moreover, the record fails to show that appellant excepted to the giving of said instructions Nos. 16 and 17, and for that reason any error in refusing to give the same would not be available on appeal.

Appellant's eighth reason for a new trial is based on the action of the court in overruling its motion for judgment on the answers returned by the 6-7. jury to the interrogatories propounded to it, notwithstanding the general verdict. This rea-

son for a new trial is presented by appellant in its brief, but this presentation raises no question for our determination, as such action of the court is not a recognized ground for a new trial. *Inland Steel Co. v. Harris* (1911), 49 Ind. App. 157, 95 N. E. 271. However, as appellant has based an independent assignment of error on the action of the court in overruling its said motion, and the argument advanced in its brief is applicable to such assignment, we will give it consideration.

The only interrogatory and answer on which appellant relies in support of its contention in this regard is No. 8, which reads as follows: "If she had listened, could said Valley May Perry have heard the noise of the defendant's locomotive and train as it approached said crossing at Sycamore street immediately before she drove on said crossing on the occasion of her injury? Answer: Yes." Accepting the fact found by said interrogatory and answer as true, as we must, it does not of itself create a conflict with the general verdict. In order for it to serve such purpose, it must be connected with a further finding that she could have heard the noise of appellant's train as stated in time to have avoided injury. The latter fact is not found by any interrogatory cited, and the general verdict must be taken as a finding to the contrary. It cannot be said with reason that appellee's daughter could have necessarily escaped injury, because she may have discovered the approach of appellant's train *immediately* before she drove on the crossing on the occasion of her injury. "Immediately" is defined as "without interval of time, promptly, instantly, at once, without delay." It certainly cannot be a forced conclusion that she could

have avoided injury because she heard the train approach at substantially the same time she drove on the crossing, as the word "immediately" indicates. And especially must this be true when we consider her probable state of mind, arising from sudden peril. Appellant has failed to point out any substantial reason as a basis for its contention that the court erred in ruling on the motion under consideration.

Appellant also predicates error on the action of the court in admitting the evidence of certain witnesses to the effect that the electric gong was

8-9. out of repair five or six days before the accident in question. It bases its objection to the admission of such evidence on the grounds that it is irrelevant and immaterial, and at a time too remote from the time the accident is alleged to have occurred. Under the averments of the complaint it was proper for appellee to show that the electric signal gong was out of order, and that it had been in that condition for such a length of time that appellant, by the exercise of ordinary care, might have had the same repaired. *Cleveland, etc., R. Co. v. Schneider* (1907), 40 Ind. App. 38, 80 N. E. 985. The evidence under consideration was clearly admissible for the purpose of establishing the latter fact. *Evansville, etc., Traction Co. v. Montgomery* (1912), 50 Ind. App. 528, 98 N. E. 731; *Indiana Union Traction Co. v. Pring* (1912), 50 Ind. App. 566, 96 N. E. 180; *Broadstreet v. Hall* (1907), 168 Ind. 192, 80 N. E. 145, 10 L. R. A. (N. S.) 933, 120 Am. St. 356. If appellant had desired to guard against its improper application by the jury, it should have asked an instruction limiting it to its legitimate purposes. *City of Delphi v. Lowery* (1881), 74 Ind. 520, 39 Am. Rep. 98. The

court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD,
CONNECTICUT, v. APPLEBAUM.

[No. 10,108. Filed December 9, 1919.]

1. **PROCESS.—*Sheriffs and Constables.—Special Deputies.***—A sheriff has power to appoint a person to serve a particular summons, and the fact that such person is not appointed as a general deputy and does not take the oath of deputy sheriff does not of itself render invalid service so made. p. 517.
2. **JUDGMENTS.—*Default.—Relief.—Excusable Neglect.***—Where the service of summons is sufficient and the return thereof unquestioned, a foreign corporation cannot urge as ground for relief from judgment by default under §135 of the Code of Civil Procedure, §405 Burns 1914, that its agent upon whom the summons was served and one of whose duties was to forward immediately copies of any process served upon him as agent of the company, had neglected to do so. p. 517.
3. **APPEAL.—*Application For Relief From Judgment by Default.—Presumptions On Appeal.—Evidence.—Review.***—The same presumptions will be indulged in on appeal in favor of the correctness of a decision in a proceeding to set aside a default on the ground of excusable neglect as in other appeals, and the appellate tribunal will not weigh the evidence. p. 517.

From Greene Circuit Court; *Theo E. Slinkard*, Judge.

Application by the Hartford Fire Insurance Company of Hartford, Connecticut, against Phillip Applebaum for relief from a judgment by default. From a judgment for defendant, the applicant appeals. *Affirmed.*

Hartford Fire Ins. Co. v. Applebaum—71 Ind. App. 514.

Barger & Hicks and *Davis & Davis*, for appellant.
Slinkard & Vosloh, *A. T. Mayfield* and *Oscar R. Shields*, for appellee.

REMY, J.—Application by appellant, under §135 of the Code of Civil Procedure (§405 Burns 1914, §396 R. S. 1881), for relief from a judgment taken against it by default. Appellee answered in denial, and a hearing by the court resulted in overruling the application. This action of the trial court is the only error relied upon for reversal.

Appellee concedes that the facts set forth in appellant's petition and supporting affidavits are sufficient to show a meritorious defense to the original action. The only question, therefore, for our consideration is whether or not, under the evidence, the failure of appellant to appear and defend was due to its mistake, inadvertence, surprise, or excusable neglect. On this issue the uncontradicted facts are that on February 7, 1917, appellee filed his complaint in an action on an insurance policy issued by appellant, which insured appellee against loss by fire of certain merchandise kept by appellee in a storeroom in the city of Jasonville, for one year from May 4, 1914, which merchandise was destroyed by fire on July 24, 1914; that on March 27, 1917, judgment by default was taken by appellee for the full amount of said policy and costs; that appellant is a foreign corporation with its principal offices in the State of Connecticut; that all of its business affairs in the State of Indiana are, and at all times were, conducted through certain general agents from their offices in Chicago, Illinois; that one Powell was at all times mentioned in appellant's petition the sole local agent of appellant in said city of Jasonville, and in the county

of Greene; that said Powell was only a recording agent with no authority to represent appellant in matters connected with litigation, except that it was his duty, when process was served upon him as agent of the appellant company, to forward immediately copies of process so served to appellant's general agency at Chicago.

The facts in controversy all go to the question of notice and process. The affidavit of appellant's said local agent definitely states that no summons citing appellant to appear and defend the said action was at any time served upon him, and that neither he nor appellant had any knowledge whatever of appellee's said action until after the default had been taken. On the other hand, appellee submitted, as a part of his evidence, what purported to be the original summons and return. It was in the usual form, and cited appellant to appear before the judge of the Greene Circuit Court on March 12, 1917, to answer to the complaint of appellee on said insurance policy; and the return which was made by the sheriff recited that service had been made on February 28, 1917, "by reading to and in the hearing of William Powell, agent" of appellant, "and by leaving a copy thereof with said agent." Indorsed on the summons just above the return were the words: "Served by reading this 28th day of Feb. 1917, Sam Bates." This evidence was supplemented by the verbal testimony of said Bates, which testimony was in substance that Bates, who was chief of police of the city of Jasonville, was not a sworn deputy sheriff, but was deputized by the sheriff of Greene county to serve this particular summons, and had served the same as directed by the sheriff, and that the service and return

had been made in all things as recited in the return which had been read in evidence.

The sheriff of Greene county had the power to appoint a person to serve this particular summons, and the fact that such person was not appointed 1-2. as a general deputy, and had not taken the oath of deputy sheriff, would not in itself render invalid the service thus made. *New Albany, etc., R. Co. v. Grooms* (1857), 9 Ind. 243; *Proctor v. Walker* (1859), 12 Ind. 660; *Earle v. Earle* (1883), 91 Ind. 27, 38. Therefore, the service by Bates, if made as shown by appellee's evidence, was a valid service of summons. The method of return and the proof of service were not questioned by motion to quash the summons or otherwise. Appellant in its application admits that one of the duties of the local agent was "to forward immediately copies of any process served upon him as agent of the company." If such agent neglected to perform this duty, appellant cannot now complain.

It has many times been held that, on appeal from a decision of the trial court in a proceeding to set aside a default on the ground of excusable neg- 3. lect, the same presumptions will be indulged in favor of the correctness of such decision as in other appeals, and that the appellate tribunal will refuse to weigh the evidence. *Williams v. Grooms* (1890), 122 Ind. 391, 24 N. E. 158; *Groff v. Warner* (1909), 44 Ind. App. 544, 89 N. E. 609.

There was evidence to sustain the decision of the trial court. Judgment affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. DANIELS AND
PICKERING COMPANY.

[No. 10,098. Filed December 10, 1919.]

1. **CARRIERS.—Extraordinary Delay.—Special Duties of Carrier.**—It is the duty of a carrier to exercise reasonable care to protect property from loss or injury during extraordinary delay in transportation, and to give the consignor or owner notice of such delay. p. 520.
2. **CARRIERS.—Unusual Delay.—Action for Failure to Preserve Property.—Evidence.—Sufficiency.**—In an action for damages to a carload of shelled corn, evidence *held* sufficient to sustain verdict for plaintiff on the theory of defendant's lack of care in giving the corn proper care and attention and in failing to notify plaintiff of the delay caused by an embargo, as a result of which a connecting line had the corn on its tracks forty days. p. 520.
3. **APPEAL.—Carriers.—Unusual Delay.—Care of Shipment.—Instructions.**—It is not reversible error, in a case wherein under the complaint and evidence the jury may rightfully find for the plaintiff on the theory that the defendant had failed to properly care for the shipment during the period of an extraordinary delay caused by an embargo at destination, or had failed to give notice of such delay so that the consignor might protect his shipment, to refuse a requested instruction to the effect that the carrier could not be held liable for delay caused by conditions over which it had no control, especially in view of the fact that the instruction as tendered was modified to exclude the rule in cases where the carrier has knowledge of such extraordinary conditions at the time of accepting the shipment, and the shipper has none, and as modified was given, to which giving no exception was taken or, if taken, has been waived. p. 522.

From Henry Circuit Court; *Fred C. Gause*, Judge.

Action by the Daniels and Pickering Company against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Pittsburgh, etc., R. Co. v. Daniels, etc., Co.—71 Ind. App. 518.

John L. Rupe, Newby & Newby and W. G. Butler,
for appellant.

Forkner & Forkner, for appellee.

McMAHAN, J.—Complaint by appellee for damages to a carload of shelled corn shipped over appellant's railroad from Middletown, Indiana, to Baltimore, Maryland, for export. The gist of the complaint is that the appellant failed to safely transport and deliver the corn within a reasonable time, negligently sidetracked it enroute without care or attention, and negligently permitted it to be delayed in transit for an unreasonable time—five weeks—and that, because of want of proper care and attention, it became damp, hot, rotten, discolored, and greatly reduced in value. There is also an allegation that, if appellant had notified appellee of the whereabouts of the car during the delay, appellee could and would have unloaded and aired said corn and in a large extent have prevented the injury, and that appellant failed to give appellee any information as to the whereabouts of said car.

Answer (1) of general denial; (2) shipment by appellant without any delay to Pitcairn Junction near Pittsburgh, Pennsylvania, where the corn was delivered to the Pennsylvania Railroad, a connecting carrier, for shipment to Baltimore, and that the delay was wholly while the car was on the Pennsylvania Railroad; that the alleged delay was caused without any fault of appellant or of the Pennsylvania Railroad, and wholly because of the congested condition at the elevators and yards at Baltimore, which made it impossible to deliver export corn at said city.

Appellant contends that the verdict is not sus-

tained by sufficient evidence, and that the court erred in refusing to give instructions 1 and 6 tendered by it. The facts as shown by the evidence are in substance as follows: There was an embargo on shipping corn to Baltimore for export trade, during the greater part of January, 1916. Appellee owned an elevator at Middletown, Indiana, and was engaged in buying and selling corn and other kinds of grain. On February 1, 1916, appellee delivered a carload of shelled corn to the appellant to be shipped to Baltimore, Maryland, for export purposes. Appellant accepted this car and, on February 5, it was delivered by appellant to the Pennsylvania Railroad, a connecting line at Pitcairn Junction near Pittsburgh, Pennsylvania, and there remained in the yard of the Pennsylvania company until the morning of February 19, when it was moved to a point about sixty miles east of Pittsburgh, where it remained until March 13, when it was again started on its way and reached Baltimore on March 17 or 18, in a damaged condition—a result of the long delay on the road. About a week after the corn had been shipped, appellee made inquiry of appellant's agent about the location of the car and, on February 19, was informed that the car had been delivered to the Pennsylvania Company on the fifth of that month. Appellee made several attempts to have appellant trace the car, which appellant refused to do. The consignee of the corn at Baltimore tried to trace it and, on February 19, was informed that the car was at Conpit Junction. Appellant did not give appellee any information concerning said car other than that it had been delivered to the Pennsylvania Railroad on February 5. There was evidence to the effect that, if appellant had

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notified appellee of the fact that the car was being delayed at Conpit or Pitcairn Junction, appellee could and would have looked after it and diverted it to some other point and have saved or, at least, have lessened the loss. When the corn reached Baltimore, it was hot and rotten, and could not be sold in its then condition. It was necessary to unload it, run it through a drier, after which it was graded as rejected corn and sold for fifty-four cents a bushel, which was nine and one-half cents per bushel less than it would otherwise have brought. The corn was in good condition when delivered to appellant for shipment and would have arrived at Baltimore in good condition if it had not been delayed in shipping. The usual time required for transporting a car of corn from Middletown to Baltimore was from seven to fourteen days.

Appellant concedes that under the Carmack amendment to the Interstate Commerce Law, it was responsible for the acts and omissions of its connecting carrier, as held in *Pittsburgh, etc., R. Co. v. Mitchell* (1911), 175 Ind. 196, 91 N. E. 735, 93 N. E. 996, but insists that the sole cause of the delay was the congested condition of the elevators at Baltimore, which made it impossible for appellant to deliver the corn at that point, and that neither appellant nor the Pennsylvania Railroad was responsible for the delay; that the carrier was not responsible for the conditions which caused the delay and, therefore, is not legally liable for damages occasioned by reason of such delay.

Appellant overlooks the fact that the complaint, in addition to charging an unreasonable delay, also charges neglect in failing to give the corn proper care

and attention, and in failing to notify appellee of the delay. The appellant very properly concedes that the law imposes upon a carrier, in cases of extraordinary delay in transportation, the duty to use all reasonable care to protect a shipment from damages on account of such delay.

It is the duty of a carrier to exercise reasonable care to protect property from loss or injury during delay in transportation, where the circumstances and conditions are such as cause an unusual delay, and it is the duty of the carrier to give the consignor or owner notice of the delay. 4 Elliott, Railroads (2d ed.) §§1481-1487.

There is, in our judgment, ample evidence to sustain the verdict. This being true, there was no error in refusing instruction No. 1, as it directed the jury to return a verdict for appellant.

Appellant complains of the refusal of the court to give instruction No. 6 tendered by it. This instruction was to the effect that it is the duty of a

3. common carrier to transport all property received for shipment as promptly as is reasonable and proper under the circumstances and, if conditions which the carrier cannot control arise which cause a delay, the carrier cannot be held liable for the delay nor for damages incidental thereto. The court modified this instruction by adding thereto the words, "Unless such carrier had knowledge of such extraordinary conditions at the time of receiving such corn, and the shipper had no notice thereof."

We do not think the failure to give the instruction as requested was reversible error. The appellant was evidently satisfied with the instruction as given, as no exception appears to have been taken to the

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giving of it or, if an exception was taken, it has been waived. There was no error in overruling appellant's motion for a new trial.

Judgment affirmed.

SPAHR, ADMINISTRATOR, v. POLCAR.

[No. 10,525. Filed December 11, 1919.]

1. **APPEAL.**—*Briefs.*—*Recital of Evidence.*—*Presumptions.*—Under Rule 22, governing the preparation of briefs the condensed recital of the evidence contained in appellant's brief will be taken as accurate and sufficient for a full understanding of the questions presented for decision unless appellee has made the necessary corrections or additions. p. 524.
2. **SALES.**—*Tailor-Made Clothing.*—*Implied Warranty.*—When an order is placed with a tailor for a suit of clothes for a particular individual, in the absence of a stipulation to the contrary, there is an implied agreement that such suit, when made, will be a reasonable fit for the person for whom it was ordered. p. 525.
3. **EVIDENCE.**—*Hearsay.*—*Effect of Failure to Object.*—Hearsay evidence unobjected to may be accepted as establishing the fact which it tends to prove. p. 525.

From Jay Circuit Court; *Emerson E. McGriff*, Judge.

Proceeding to enforce claim by Charles G. Polcar against Charles O. Spahr, administrator of the estate of Caddie E. Spahr, deceased. From a judgment for claimant, the defendant appeals. *Reversed.*

James R. Fleming, for appellant.

S. A. D. Whipple, for appellee.

BATMAN, J.—This is an action arising out of a claim filed by appellee against the estate of Caddie E.

Spahr, deceased, for clothing furnished by him to the husband and two sons of decedent, and for money loaned to her, including interest on the alleged indebtedness. The cause was submitted to the court for trial, resulting in a judgment in favor of appellee for \$284.24. Appellant filed a motion for a new trial on the grounds that the decision of the court is not sustained by sufficient evidence, and is contrary to law. Said motion was overruled, and this action of the court is the sole error assigned on appeal.

Appellant in his brief has set out what he claims to be a condensed recital of the evidence in narrative form. Under Rule 22, governing the prepara-

1. tion of briefs, such recital will be taken to be accurate, and sufficient for a full understanding of the questions presented for decision, unless appellee has made the necessary corrections or additions. An inspection of appellee's brief discloses that he has not made any such corrections or additions, but has expressly stated that appellant's statement of the evidence is substantially correct. We will therefore direct our attention to the recital of the evidence made by appellant in his brief, in determining whether the decision of the court is sustained by sufficient evidence. An examination of this recital fails to disclose any evidence which tends to show that the estate of Caddie E. Spahr is liable for any portion of the claim in suit, unless it be the item of \$35 for a suit of clothes charged to the decedent under date of April 24, 1912. The undisputed evidence with reference to this particular suit is that it was ordered by the decedent for her husband; that appellee made the same, and then asked decedent's husband to come up and try it on; that he afterwards came home and

said it would not fit him, and he would not take it. The evidence also showed that the suit was still in appellee's possession at the time of the trial. There is no evidence that the suit, when made, fit the decedent's husband for whom it was ordered, or that appellee altered the same so that it would fit him, nor is there any evidence that appellee made any further effort to deliver the suit to the decedent or her husband, or to have either of them accept the same.

Where an order is placed with a tailor for a suit of clothes for a particular individual, in the absence of a stipulation to the contrary, there is an im-

2. plied agreement that such suit, when made, will be a reasonable fit for the person for whom it was ordered. In the instant case there is no evidence that would exclude such an implied agreement, while the fact that appellee requested the decedent's husband to come up and try it on tends to show that he understood that the suit was to be made to fit.

The only evidence whether the suit did or did not fit is that given by the son of the decedent, who stated that, after appellee had requested his father

3. to come up and try on his suit, he (the father) "came home and said it would not fit him, and he would not take it out of the shop." True, this statement is hearsay evidence, but, as it does not appear that any objection was made to the same, it may be accepted as establishing the fact which it tends to prove. *Metropolitan Life Ins. Co. v. Lyons* (1912), 50 Ind. App. 534, 98 N. E. 824; *Hege & Co. v. Tompkins* (1919), 69 Ind. App. 273, 121 N. E. 677, and cases there cited. For the reasons stated, the evidence fails to show any liability on the part of the estate of decedent for the particular suit in question. It follows,

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from what we have said, that the decision of the court is not sustained by the evidence, and for that reason appellant's motion for a new trial should have been sustained.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings consistent with this opinion.

COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, OF
LONDON, ENGLAND, v. SCHUMACHER.

[No. 9,510. Filed May 14, 1918. Rehearing denied November 21, 1918. Transfer denied December 11, 1919.]

1. *APPEAL.—Briefs.—Argument.*—An argument is not an indispensable part of a brief. p. 531.

APPEAL.—Briefs.—Time of Filing.—Motion for Reversal.—Discretionary Power.—Since the failure of appellee to file a brief within the time provided by the rules does not compel a reversal, but only calls for an exercise of the discretionary power of the court in cases where appellant's brief shows reversible error, a motion for a reversal for such failure will be overruled where appellee later files his brief upon leave granted by the court. p. 531.

3. *PLEADING.—Exhibits.—Effect.—Insurance.*—An allegation in a complaint on a policy that defendant is a corporation duly organized under the laws of three separate jurisdictions, is mere matter of description and is controlled by the policy, made part of and an exhibit to the complaint, as to the identity of the insurer. p. 532.

4. *JUDGMENTS.—Persons Concluded.—Appearance.*—An English corporation named as defendant in the caption of the complaint, and which appeared and answered without denying the execution of the policy sued on which purported to have been issued by it, is bound by the judgment rendered, although there was an allegation that such corporation was organized under the laws of England and of New York and Illinois. p. 532.

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5. **INSURANCE.—Contract.—Waiver of Appraisal.—Maturity.—Pleading.**—Under a policy of insurance postponing the maturity of a claim for a fire loss until sixty days after notice, ascertainment, estimate and satisfactory proof of loss have been received by the company, including an award by appraisers when appraisal has been required, a complaint that alleges a loss by fire, and due notice and proof thereof, and that defendant, upon demand, failed and refused to join in making said proof, ascertainment or estimate of loss and refused to pay anything on account thereof, in effect charges a waiver on the part of the company of its right to an appraisal, and sufficiently shows that the claim is due and unpaid. p. 533.
6. **INSURANCE.—Misrepresentation by Insured.—Knowledge Chargeable to Insurer.—Pleading.**—A reply to an answer of material misrepresentations in procuring the policy, as to the facts concerning the horse-power, catalogue price, purchase price and whether new or second-hand, of the automobile insured, which alleges that the agents of defendant inspected the car to learn the facts as to all such matters, and that with such knowledge they applied for and obtained the policy for the plaintiff, sufficiently charges the defendant with knowledge of such facts when issuing the policy. p. 535.
7. **INSURANCE.—Misrepresentations by Insured.—Waiver After Knowledge.**—A reply sufficiently states a waiver of alleged misrepresentations charged by answer to have been made by the insured in procuring the policy, where it avers knowledge of such misrepresentations on the part of the insurer at the time of issuing the policy, and a retention of the premium for more than a year, the term of the policy, and until after the action was brought upon the policy in which such answer and reply were filed, and where such reply alleges that the tender then made was not made within a reasonable time after knowledge of the facts and of the loss. p. 536.
8. **PLEADING.—Conclusions.—Effect in Absence of Motion To Require Facts.—Tender.**—An allegation that a tender was not made within a reasonable time is a conclusion, but is sufficient, under §343a Burns 1914, Acts 1913 p. 850, in the absence of a motion to require the statement of the facts necessary to support it. p. 536.
9. **INSURANCE.—Contracts.—Statute Part of Contract.—Rules of Construction.**—When a statute is, by its terms, part of an insurance policy, such statute is to be construed to effectuate the purpose of its enactment, and the meaning of such policy is to be ascertained from all its provisions in their entirety and not from a literal or technical construction of isolated or special

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clauses, the general rule being to construe an insurance contract liberally in behalf of the insured, so as to effectuate its purpose, resolving doubts in his favor. p. 539.

10. **INSURANCE.—Loss.—Appraisal.—Default.—Actions on Policies.—Maturity of Claim.**—Under a policy governed by §4622g Burns 1914, Acts 1911 p. 525, and containing a provision postponing the maturity of any claim thereunder for sixty days after the receipt by the company of an award by appraisers when appraisal has been required, the effect of the statute is to provide an effective means of ascertaining the amount of loss under such policy in order to meet such requirement, and, according as the insured or the insurer fails when required by the opposite party to designate an appraiser within the time provided in the statute therefor, the loss admitted by the insurer or the loss claimed in the preliminary proof by the insured becomes the ascertained loss and is recoverable by suit at the expiration of sixty days from such default. p. 540.
11. **INSURANCE.—Loss.—Demand for Appraisal.—Time.—Receipt of Letter.**—A demand by insurer addressed to insured's attorney, for an appraisal, and naming an appraiser, would not operate to cause the running of the five-day period provided by §4622g Burns 1914, Acts 1911 p. 525, until the insured actually received the letter, in the absence of any showing that his attorney had authority to open the letter or to receive notice of such demand and appointment. p. 542.
12. **INSURANCE.—Loss.—Demand For Appraisal.—Offer of Compromise.—Effect.—Waiver.**—A suggestion of the possibility of an avoidance of an appraisal by compromise, contained in a letter from insurer to insured, demanding an appraisal and naming an appraiser, which letter also contained the express statement that the suggestion should not be taken as a waiver of the demand, is not sufficient to excuse the insured from appointing an appraiser within the period designated by §4622g Burns 1914, Acts 1911 p. 525. p. 542.
13. **INSURANCE.—Waiver of All Defenses.—Knowledge.—Action on Policy.**—A reply of waiver of all defenses, set up to an answer of misrepresentations in procuring the policy, is bad when there is no allegation in such reply of any knowledge by the insurer of such misrepresentations by insured at the time the alleged acts constituting the claimed waiver were done, since a waiver is an intentional relinquishment of a known right, or conduct that warrants an inference thereof, an election to forego some advantage that could have been taken or insisted upon, and, knowledge of the right, charged to have been waived, is an essential to such waiver. p. 543.

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14. **INSURANCE.—Loss.—Admission by Insured.—Equal Right of Parties to Demand an Appraisal.—Pleading.**—Where, under the provisions of §4622g Burns 1914, Acts 1911 p. 525, the insurer has, in a suit on the policy, filed a good, partial answer of admitted loss, it is not a good reply thereto that the insurer did not seasonably demand in writing an appraisal, since the insured cannot complain of the failure of the insurer to exercise a right common to both parties. p. 544.
15. **TRIAL.—Instructions.—Special Defenses.—Failure of Proof.**—Giving an instruction that directed a verdict for the plaintiff, if he had established all the material allegations of his complaint, if the defendant had failed to prove the material allegations of some one of its special defenses, is reversible error, since an action may be defeated by the establishment of all the material allegations of a single good, affirmative paragraph of answer addressed to the entire complaint. p. 545.
16. **TRIAL.—Instructions.—Treating Insufficient Reply as Good.**—Giving an instruction that treats an insufficient reply, challenged by demurrer, as sufficient, is reversible error. p. 546.

From Warrick Circuit Court; *Union W. Youngblood*, Special Judge.

Action by Samuel Schumacher against the Commercial Union Assurance Company, Limited, of London, England. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Burke G. Slaymaker and *Kiper & Fulling*, for appellant.

Arch Stevenson, *John R. Brill*, *Frank H. Hatfield* and *John W. Brady*, for appellee.

BATMAN, P. J.—This is an action by appellee against appellant to recover damages to an automobile, under a policy of fire insurance. The complaint is in a single paragraph, and alleges, among other things: That defendant is a corporation, duly organized under and pursuant to the laws of the State of New York, the laws of the State of Illinois, and the laws of London, England; that defendant is engaged

in insuring against loss by fire; that by its policy, dated August 6, 1912, defendant, in consideration of \$24 paid by plaintiff, insured plaintiff against loss or damage by fire to the amount of \$1,200 on one Pullman automobile, factory No. 4242, touring car type, gasoline motive power, four cylinders, forty horse power, model 1910, by which policy defendant agreed to indemnify plaintiff against any loss or damage, not exceeding \$1,200, that should happen by fire to said property during one year from the date of said policy; that a copy of said policy, marked "Exhibit A," was filed with the complaint and made a part thereof; that on July 28, 1913, while said policy was in effect, said automobile was destroyed by fire; that said loss was insured against by said policy; that plaintiff at all times owned the insured property, which was of the value of \$1,500; that he has fulfilled and performed all conditions to be by him performed under the terms of said policy; that defendant, upon demand by plaintiff, failed and refused to join plaintiff in making proof, ascertainment or estimate of said loss, and refused to pay anything; and that plaintiff has been damaged in the sum of \$1,500. The policy, which is made a part of the complaint by exhibit, is not set out in this opinion, because of its length, but reference will be made later to such portions as may become material in determining the questions presented. Appellant filed a demurrer to the complaint upon the grounds that the court had no jurisdiction of the action, and that the complaint does not state facts sufficient to constitute a cause of action. With such demurrer appellant filed a memorandum which directed the court's attention to the questions hereinafter determined with reference to such complaint.

This demurrer was overruled, and appellant then filed an answer in five paragraphs, the first being a general denial. No demurrer was addressed to any of such paragraphs of answer. Appellee filed a reply in five paragraphs, the first being a general denial. Appellant filed a demurrer to each of said paragraphs of reply except the first, with a sufficient memorandum to require a consideration of the questions hereinafter determined with reference thereto. This demurrer was overruled as to each of said paragraphs, and appellant duly excepted. The cause was submitted to a jury for trial, and a verdict was returned in favor of appellee for \$900, on which judgment was accordingly rendered. Appellant filed a motion for a new trial, which was overruled. It now prosecutes this appeal, and has assigned as errors the overruling of its demurrer to the complaint, the overruling of its demurrer to the several paragraphs of reply, and the overruling of its motion for a new trial.

Appellant filed its original brief in due time, but appellee failed to file a brief within the time required by the rules. Appellant thereafter filed a motion for an order requiring appellee to return the transcript in this cause to the office of the clerk of this court, and for a reversal of the judgment because of appellee's failure to file a brief. The determination of this motion was postponed until the final hearing. Appellee seeks to justify such failure on the ground that appellant had not made any argument on the propositions and points stated in its brief. He contends that such omission rendered such brief incomplete, and constituted a waiver of any alleged error. We cannot concur in this con-

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tention. Rule No. 24 provides that: "The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same." In accord with this rule, it has been held that an argument is not a necessary part of a brief. *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9. However, the failure of appellee to file a brief within the time provided by the rules does not compel a reversal of the judgment. Such failure only calls for an exercise of the discretionary power of the court, which, it has been held, should not be exercised against the judgment of the trial court, except in cases where the appellant's brief shows that reversible error was in fact committed by such court. *Simon v. City of Wabash* (1915), 58 Ind. App. 127, 107 N. E. 738; *McClure v. Anderson* (1915), 58 Ind. App. 615, 108 N. E. 757. Subsequently to the filing of this motion by appellant, appellee on petition was granted leave to file his brief. Such brief was filed within the time given. Under the facts and circumstances of this case, we believe such motion should be overruled, which is now accordingly done.

Appellant's first assignment of error challenges the action of the court in overruling its demurrer to the complaint. It is contended that the com-

3-4. plaint alleges that the policy in suit was executed by three separate and distinct corporations, and therefore the identity of appellant with the corporation executing the policy is not shown. This contention is based on the allegation "that said defendant is a corporation organized under and pursuant to the laws of the State of New York, the laws of the State of Illinois, and the laws of London,

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England." This allegation does not support appellant's contention. Only one corporation is sued, although it is alleged that it was organized under and pursuant to the laws of three separate jurisdictions. This allegation is a mere matter of description, and is controlled by the policy which is filed with the complaint as an exhibit. *Globe, etc., Ins. Co. v. Reid* (1898), 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; *First Nat. Bank v. Joseff* (1914), 57 Ind. App. 320, 105 N. E. 175; *Stewart v. Knight & Jillson Co.* (1906), 166 Ind. 498, 76 N. E. 743; *Huber Mfg. Co. v. Wagner* (1906), 167 Ind. 98, 78 N. E. 329; *Simons v. Kosciusko Bldg., etc., Assn.* (1913), 180 Ind. 335, 103 N. E. 2. The policy itself purports to have been issued by the "Commercial Union Assurance Company of London, England." This company is named as defendant in the caption of the complaint and, as appellant appeared thereto and answered, without denying the execution of the contract, it is bound by the judgment rendered.

It is further contended that there are no allegations in the complaint that the claim sued on has matured or become due, or that it is unpaid;

5. that such allegations are essential to the sufficiency of the complaint, and hence the court erred in overruling the demurrer thereto. The policy in suit contains the following provision relating to the maturity of any claim for loss thereunder: "And the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by the [redacted], including an award by appraisers, when appraisal has been required." The complaint alleges the issuance of the policy, a loss

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by fire thereunder, and that due notice and proof thereof had been given and made. It does not allege that the amount of the loss had been ascertained by an appraisal, but does allege: "That said defendant, upon demand by this plaintiff failed and refused to join this plaintiff in making said proof, ascertainment or estimate of loss, and refused to pay anything on account thereof." This is, in effect, a charge that appellant had waived its right to an appraisal. *Providence Washington Ins. Co. v. Wolf* (1907), 168 Ind. 690, 80 N. E. 26, 120 Am. St. 395. Where there has been proper proof of loss and a waiver of an appraisal, the claim is then due. There is a sufficient allegation that the claim is unpaid. We conclude that the court did not err in overruling the demurrer to the complaint.

Appellant predicates error on the action of the court in overruling its demurrer to the second paragraph of reply. This paragraph of reply is addressed to the third and fifth paragraphs of answer. Said paragraphs of answer are based on the following provisions of said policy: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. * * * If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured." It is alleged that appellee made certain representations with reference to the horse power, catalogue price of said automobile, the amount paid by appellee therefor, and whether it was new or second-hand when purchased by him; that these representations were embodied in said policy; that the

same were false, and known by appellee to be false when made; that appellant did not know they were false, and relied thereon in issuing such policy. Said second paragraph of reply is based on a waiver of said false representations. It alleges that the agents of appellant, through whom said policy was procured, had personal knowledge of the exact condition, size, character and value of the automobile in question before said policy was issued; that said agents personally inspected said car for the purpose of ascertaining its true condition as to age, style, size, power and value, to enable them as such agents to determine and pass upon said risk and to issue said policy; that with said knowledge said agents applied for said policy of insurance and obtained the same for appellee; that thereafter they countersigned and delivered the same, and collected the premium therefor on August 6, 1912; but that appellant did not tender back said premium until April 23, 1914, which was not within a reasonable time after obtaining knowledge of the facts averred in said paragraph of answer.

The memorandum filed by appellant with its demurrer to appellee's reply raises only two questions with reference to the second paragraph there-

6. of. Its first contention is that said paragraph does not charge appellant with knowledge of the facts alleged as a basis of defense in the paragraphs of answer to which it is addressed. It will be observed that the only representations alleged in said paragraphs of answer which, if false, would defeat appellee's right of recovery are those which are descriptive of the automobile in question or those which relate to other material matters. A consideration of said second paragraph of reply leads us to conclude

that it alleges that appellant, at the time said policy was issued, had knowledge of all facts concerning which it is claimed false representations were made that properly come within the provisions of the policy on which such paragraphs of answer are based.

Appellant's second contention with reference to the sufficiency of said paragraph of reply is that the alleged delay in tendering back the premium on 7-8. the policy in suit does not constitute a waiver of the breach alleged in the paragraphs of answer to which it is addressed. We cannot concur in this contention. It is well settled in this state that, when an insurance company desires to avoid liability on a policy on account of a breach of warranty, or fraud in its procurement, it must act with reasonable promptness and make seasonable tender to the holder of such policy of the premium received therefor. *Commercial Life Ins. Co. v. Schroyer* (1911), 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A 968; *Mutual Life Ins. Co. v. Finkelstein* (1915), 58 Ind. App. 27, 107 N. E. 557; *Insurance Co., etc. v. Indiana Reduction Co.* (1917), 65 Ind. App. 330, 117 N. E. 273. It will be observed that the paragraphs of answer to which said second paragraph of reply is addressed are based on certain alleged misrepresentations made by appellee in the procurement of the policy in suit. Such paragraph of reply charges that appellant collected the premium for such policy on August 6, 1912, and then alleges that "no tender back was ever made by the defendant company to the plaintiff of said premium paid for said policy until after the filing of this action, and until the 23rd day of April, 1914, which plaintiff says was not within a reasonable time after said fire and the learning of the facts by the

defendant company set up and referred to in each said third and fifth paragraphs of answer." True, the allegation that such tender was not made within a reasonable time may be said to be a conclusion, but it is sufficient under §343a Burns 1914, Acts 1913 p. 850, in the absence of a motion to require a statement of facts necessary to sustain the same. *Schlosser v. Nicholson* (1916), 184 Ind. 283, 111 N. E. 13; *Miller v. Gates* (1916), 62 Ind. App. 37, 112 N. E. 538. For the reasons stated, we conclude that the questions raised by appellant as to the sufficiency of said second paragraph of reply are not well taken.

Appellant also predicates error on the action of the court in overruling its demurrer to the third paragraph of reply. This paragraph of reply is addressed to the amended second and the fourth paragraphs of answer. Each of these paragraphs charge a breach of the terms and conditions of the contract in suit relating to an appraisal of the alleged loss, by failing to comply with the provisions in that regard contained in an act of the general assembly of this state approved March 6, 1911, being §4622g Burns 1914, Acts 1911 p. 525. Said act, by its terms, is a part of said contract, and provides the manner in which proofs of loss to any property in this state shall be made, under policies insuring the holders against loss and damage from fire, lightning, or tornado, and requiring a preliminary proof thereof. It then provides that the insurance company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof thereof, unless within a specified time it shall notify the insured in writing of the amount of loss, if any, that it admits. It further provides as follows: "If the insured and the

insurance company shall fail to agree in whole or in part within ten days after notice of the amount of loss, if any, that the company admits, as above provided, either party shall have the right forthwith to demand in writing an appraisement of the loss or part of loss as to which there is a disagreement, and such party so demanding an appraisement shall name in writing a competent and disinterested appraiser, and thereupon, and within five days after the receipt of such demand and name of appraiser, the other party shall appoint a competent and disinterested appraiser, and give notice thereof in writing to the party making such demand for appraisement." Said section then provides for the qualification of such appraisers, and the appointment of an umpire on their failure to agree, and for the appointment of other appraisers and the selection of a second umpire on the failure of the first appraisal.

Appellant alleges in substance in its said amended second and in its fourth paragraph of answer that after appellee had made his proof of loss it notified him in writing, within ten days after the receipt thereof, that it admitted a loss and damage of \$750 to the automobile in question; that there was a failure to agree as to the amount of such loss within ten days thereafter, and thereupon it made a written demand for an appraisement of the loss, and at the time named in writing a competent and disinterested appraiser; that appellee did not, within five days after the receipt of such demand and the naming of such appraiser, give it notice of the appointment of a competent and disinterested appraiser for the purpose of making such appraisement, and in fact did not make such appointment, but neglected to do so,

and refused to participate in any such appraisalment. The theory of said amended second paragraph is that appellee, having failed to appoint an appraiser to assess the damages to the automobile in question within the five-day period prescribed by said act, is not entitled to recover any amount of said policy. The theory of said fourth paragraph is that appellee, by reason of such failure, is not entitled to recover any amount on said policy in excess of the sum of \$750, which appellant, in compliance with said act, had admitted to be appellee's loss on the automobile in question, together with interest thereon since the date of such admission. In support of such theories appellant contends that, when the policy refers to an ascertainment of a loss by an appraisal, it refers to the appraisalment provided by said §4622g Burns 1914, *supra*; and that the alleged failure of appellee to appoint an appraiser within five days after it demanded an appraisal, appointed its appraiser, and gave due notice thereof, is either a complete bar to appellee's right of recovery, as asserted in its amended second paragraph of answer, or a bar to any amount in excess of the sum which it admitted to be appellee's loss, with interest thereon since the date of such admission, as asserted in its fourth paragraph of answer.

In considering this contention it should be noted that the act in question by its terms is made a part of the policy in suit, and thus becomes a part

9. of the contract between the parties. The true meaning of the contract must be ascertained from all its provisions in their entirety, and not from a literal or technical construction of any isolated or special clause of the same. *Nave v. Powell* (1913), 52

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Ind. App. 496, 96 N. E. 395; *Kann v. Brooks* (1913), 54 Ind. App. 625, 101 N. E. 513. As a general rule an insurance contract must be liberally construed in behalf of the insured, so as to effectuate its purpose, and doubts are to be solved in his favor. *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; *American Surety Co. v. Pangburn* (1914), 182 Ind. 116, 105 N. E. 769, Ann. Cas. 1916E 1126; *Hay v. Meridian Life, etc., Co.* (1915), 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919. And where a statute forms part of the same it should be construed so as to give effect to the purpose intended to be accomplished by its enactment. *In re Whisler* (1914), 56 Ind. App. 269, 105 N. E. 158; *Board, etc. v. Given* (1907), 169 Ind. 468, 80 N. E. 965, 82 N. E. 918. When the entire contract in suit is considered in the light of these well-settled rules we cannot sustain appellant's amended second paragraph of answer. To do so would require that we hold, in effect, that appellee had forfeited his cause of action by a failure to appoint an appraiser within the designated five-day period. Neither the letter nor the spirit of the act requires this construction. It should be noted that the contract in suit makes an appraisal of the amount of any loss under said policy a condition precedent to a right of recovery, by postponing the maturity of any such claim for sixty days after the receipt by said company of an award by appraisers, where an appraisal has been required. One of the evident purposes of the act in question was to provide an effective means of ascertaining the amount of loss under such a policy, in order to meet such requirement, and the act should be so construed as to accomplish this purpose, if reasonably possible.

This leads to a consideration of the effect of the act on a policy of fire insurance, of which such provision and such act form parts. From such a consideration we conclude that, when a loss has occurred under such a policy, and the insured has furnished the insurer a preliminary proof of loss, as required by the act, and the insurer fails for a period of ten days after the receipt thereof to notify the insured in writing of the amount of loss which it admits the insured has sustained, the amount claimed by the insured in his preliminary proof of loss becomes the ascertained amount thereof, within the meaning of such policy, and suit may be maintained therefor at the expiration of sixty days after such default. In the event the insurer notifies the insured of the amount of loss which it admits he has sustained, and the parties fail to agree as to the amount of such loss within ten days thereafter, the act in question gives either party a right forthwith to demand an appraisal of the loss, and provides the procedure in that regard. If the insured demands an appraisal, and the insurer defaults by failing to appoint its appraiser within the designated five-day period, the amount claimed by the insured in his proof of loss becomes the ascertained amount thereof within the meaning of such a policy, and suit may be maintained therefor at the expiration of sixty days after such default. If the insurer demands an appraisal, and the insured defaults by failing to appoint an appraiser within the designated five-day period, the amount of loss which the insurer has admitted the insured has sustained becomes the ascertained amount thereof within the meaning of such a policy, and suit may be maintained therefor at the expira-

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tion of sixty days after such default. Under this construction it is apparent that appellant's amended second paragraph of answer is insufficient, while the fourth paragraph thereof states a good partial defense.

Appellee's third paragraph of reply, addressed to said amended second and said fourth paragraphs of answer, alleges, among other things, that the 11-12. letter in which appellant demanded an appraisal of his loss, and named an appraiser therefor, was dated October 6, 1913, and was addressed to appellee in care of his attorney at Rockport, Indiana; that appellee lived eight miles therefrom and had no telephone; that said letter contained the following statement:

“We have heretofore made you some compromise propositions which you have neither declined nor accepted. Without in any way waiving the above demand if you have any reasonable proposition to make perhaps appraisal can be avoided.”

That this statement was made for the purpose of delaying him in naming his appraiser within the designated five-day period, which purpose was then unknown and unsuspected by him; that as soon thereafter as he was satisfied that an adjustment or compromise of his claim could not be effected, he named one Atkinson, a competent and disinterested person, to act for him in appraising said loss and notified appellant of such fact by letter dated October 15, 1913. It should be observed that it is alleged that the letter in which appellant demanded an appraisal and named an appraiser was addressed to appellee in care

of his attorney. The designated five-day period given appellee in which to appoint such appraiser would not begin to run until he received the letter, as there is no showing that his attorney had any authority to open the same, or receive notice of such demand and appointment on appellee's behalf. However, such paragraph of reply does not allege when appellee received the letter, and hence it fails to show that he appointed an appraiser within the prescribed period. It should be noted that the statement in the letter from appellant on which appellee bases his excuse for delay in appointing an appraiser contains the express statement that its suggestions regarding the avoidance of an appraisal should not be taken as a waiver of its demand therefor. We are therefore of the opinion that appellee was not justified, by reason of such statement, in failing to appoint an appraiser within the designated period. For the reasons stated, we hold that the court erred in overruling appellant's demurrer to said third paragraph of reply in so far as it is addressed to said fourth paragraph of answer.

Appellant predicates further error on the action of the court in overruling its demurrer to the fourth paragraph of reply. This paragraph of reply

13. is addressed to each the second, third, fourth and fifth paragraphs of answer. It alleges in substance that on September 10, 1913, prior to any demand for an appraisal, appellant admitted its liability and undertook to adjust the amount of appellee's loss; that it offered appellee \$750 in payment thereof, and informed him that he could either accept said amount or bring suit on the policy; that afterwards, on November 18, 1913, appellant denied liability and made inquiry of him whether he wished to

make any compromise proposal. On these alleged facts appellee bases a waiver of all defenses set up in said several paragraphs of answer. A waiver is defined as an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right; an election by one to forego some advantage he might have taken or insisted upon. *Shedd v. American Credit, etc., Co.* (1911), 48 Ind. App. 23, 95 N. E. 316; *Templer v. Muncie Lodge, etc.* (1912), 50 Ind. App. 324, 97 N. E. 546; *Bucklen v. Johnson* (1898), 19 Ind. App. 406, 49 N. E. 612; *Aetna Life Ins. Co. v. Fitzgerald* (1905), 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232, 6 Ann. Cas. 551. It will thus be observed that knowledge of the right which it is charged is waived is an essential to such waiver. The right involved in said third and fifth paragraphs of answer is the right to defend on account of certain alleged misrepresentations of facts made by appellee and embodied in said policy. There is no allegation in said paragraph of reply of any knowledge of such misrepresentations on the part of appellant when the acts constituting the alleged waiver were done, and hence it is insufficient to avoid the defense set up in said paragraphs of answer. For the reasons indicated, we hold that the court erred in overruling appellant's demurrer to said fourth paragraph of reply in so far as it is addressed to said third and fifth paragraphs of answer.

Error is also based on the action of the court in overruling appellant's demurrer to the fifth paragraph of reply. This paragraph is addressed

14. to the amended second and the fourth paragraphs of answer. We have heretofore held that said amended second paragraph of answer is in-

sufficient. The fourth paragraph of answer is addressed only to so much of the complaint as seeks to recover an amount in excess of the sum of \$750 and interest thereon. Appellee seeks to avoid such partial answer by alleging in said fifth paragraph of reply that appellant and appellee disagreed as to the amount of such loss, but appellant did not forthwith, nor within a reasonable time thereafter, demand in writing an appraisal of such loss; and for such reason appellant should be estopped to set up such partial defense. This paragraph of reply is clearly insufficient. Appellee had an equal right with appellant to demand an appraisal, and if he failed to exercise such right he has no ground for complaint because appellant failed to do so. The overruling of such demurrer, in so far as it is addressed to said fourth paragraph of answer, was error.

Appellant contends that the court erred in giving certain instructions, among which are Nos. 1 and 3, given by the court on its own motion. Said

15. instruction No. 1, after setting out the complaint including a copy of the policy in suit, concludes as follows: "To this paragraph of complaint, the defendant has filed its answer in general denial of each and every material allegation therein contained, and upon the issues thus joined, the burden is upon the plaintiff to establish each and every material allegation of the complaint by a fair preponderance of the evidence, before he would be entitled to recover, and if you find from a preponderance of the evidence that each material allegation of the complaint is true and that the defendant has failed to prove the material allegations of some one of its additional paragraphs of answer hereafter re-

ferred to, then your verdict should be for the plaintiff."

It will be observed that by said instruction the court told the jury that, if it found "that the defendant has failed to prove the material allegations of some one of its additional paragraphs of answer hereinafter referred to, then your verdict should be for the plaintiff." Taking this clause, in connection with the other parts of such instruction, it directed the jury to return a verdict for appellee if he had established all the material allegations of his complaint, unless appellant had established all the material allegations of all its affirmative paragraphs of answer. This renders the giving of such instruction reversible error, as a defendant may defeat an action by establishing all the material allegations of a single good affirmative paragraph of answer, if addressed to the entire complaint. *Manion v. Lake Erie, etc., R. Co.* (1907), 40 Ind. App. 569, 80 N. E. 166.

By instruction No. 3 given by the court on its own motion, the court informed the jury that appellee had filed four affirmative paragraphs of reply 16. to the several affirmative paragraphs of answer. After reciting the contents of said several paragraphs of reply, the instruction concludes as follows: "The burden is upon the plaintiff to establish the material allegations of one or more of his said second, third, fourth and fifth paragraphs of reply, by a preponderance of the evidence, in order to establish a waiver of the defense set out by the defendant in the paragraph of answer to which any such paragraph of reply is addressed." By this instruction the jury was told, in effect, that, if appellee had proved any one of its affirmative paragraphs of

reply, a waiver of the defense set out in the paragraph of answer to which it was addressed was thereby established. It should be noted that we have heretofore held the third, fourth, and fifth paragraphs of such reply insufficient, but the instruction treats them as sufficient and informs the jury that, if proved, they will have the effect of avoiding the paragraphs of answer to which they are addressed. It has been held that a defendant is not entitled to have an insufficient answer treated as sufficient in an instruction to the jury. *Postel v. Oard* (1890), 1 Ind. App. 252, 27 N. E. 584. This is evidently equally true of an insufficient reply, and especially when such reply is challenged by demurrer. We therefore hold that the giving of such instruction was reversible error.

Appellant has presented other alleged errors, relating to the admission of evidence and the giving and refusing to give certain instructions, but, as they may not reoccur on another trial, they are not considered or determined. For the reasons stated, the judgment is reversed, with instructions to sustain appellant's motion for a new trial, and to sustain its demurrer to the third paragraph of reply in so far as it is addressed to said fourth paragraph of answer; to sustain its demurrer to the fourth paragraph of reply in so far as it is addressed to said third and fifth paragraphs of answer; to sustain its demurrer to the fifth paragraph of reply in so far as it is addressed to said fourth paragraph of answer, with leave to the parties to amend their respective pleadings if they so desire, and for further proceedings not inconsistent with this opinion.

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WINONA ELECTRIC LIGHT AND WATER COMPANY v.
GOSHERT.

[No. 10,577. Filed December 11, 1919.]

1. **APPEAL.—Vacation Appeals.—Submission.—Date.**—Under §693 Burns 1914, Acts 1885 p. 219, an appeal in vacation is submitted as of course at the expiration of thirty days from the date of service of notice on the appellee of the taking of the appeal, except (1) where otherwise ordered by the court, and (2) where the notice is waived and the appellee has entered a general appearance. p. 550.
2. **APPEAL.—Submission.—Notice by Clerk to Attorneys.—Rules.**—Rule 18 of the Supreme Court, by implication makes it the duty of the clerk to enter an order of submission at the expiration of thirty days after service of notice on the appellee in every civil cause which does not come within either exception contained in §693 Burns 1914, Acts 1885 p. 219, and to mail a notice of such submission to at least one of the attorneys whose names are appended to the assignment of errors, but the mailing of the notice satisfies that duty. p. 550.
3. **APPEAL.—Submission.—Appellant's Brief.—Rules.—Dismissal.**—The rule requiring appellant's brief to be filed within sixty days after submission is strictly enforced by dismissal. p. 550.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action between Ida M. Goshert and the Winona Electric Light and Water Company. From the judgment rendered, the latter appeals. *Dismissed.*

William D. Frazer, James R. Frazer, J. Edward Headley and Lemuel R. Royse, for appellant.

PER CURIAM.—This appeal is from a judgment rendered on May 23, 1918. Notice of the appeal was served on the clerk of the trial court April 12, 1919, and on the appellee April 24, 1919. The transcript was filed on May 21, 1919. The cause was submitted

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on June 20, 1919. The time allowed appellant for filing its brief expired August 20, 1919; but within the time so allowed no brief was filed, and no request was made for an extension of the time for the purpose of filing briefs. By inadvertency the clerk of this court failed to enter an order of dismissal as required by Rule 21. On October 7, 1919, appellant filed a petition for permission to file its briefs.

The following is the substance of the petition: "William D. Frazer is the senior member of the firm of Frazer, Frazer & Headley, and is General Counsel for the appellant. In the trial of the cause he was assisted by Lemuel W. Royse, of Warsaw, and William B. Hess, of Plymouth. When it was determined to appeal the cause, the preparation of appellant's brief was assigned to him (W. D. Frazer). He was aware of the rule of court which provides that when a cause is submitted notice shall be given to one at least of the attorneys representing the appellant; and he relied on that rule and supposed that he would receive notice of the submission. He did not forward appellant's brief until October 3, 1919. On Oct. 4, 1919, he was informed by one of appellee's attorneys that the cause had been submitted on June 22, 1919. He has received no notice of the submission, and no notice thereof has come to the office of the firm of Frazer, Frazer & Headley. He is informed by his co-counsel that neither of them has received notice of the submission. By reason of the failure to receive notice of the submission he was misled as to the time within which appellant's brief should have been filed. He had no notice of the submission until Oct. 4, 1919.

"Wherefore, he asks that the submission be set

aside and vacated and that permission be granted to file appellant's brief."

The appellee has filed a motion to dismiss the appeal on the ground that appellant's briefs were not filed within the time fixed by the rule of court.

Section 693 Burns 1914, Acts 1885 p. 219, provides in a general way when appeals in civil cases shall be submitted. The language of that section is

1-3. somewhat awkward, but it may be ascertained therefrom that an appeal in vacation will be submitted as of course at the expiration of thirty days from the date of service of notice on the appellee of the taking of the appeal, except (1) where otherwise ordered by the court, and (2) where the notice is waived and the appellee has entered a general appearance. Rule 18 of the Supreme Court, by implication, makes it the duty of the clerk to enter an order of submission at the expiration of thirty days after service of notice on the appellee in every civil cause which does not come within either exception of the statute. By said rule the further duty is imposed upon the clerk, whenever he makes an order of submission under the statute, to "mail notice of such submission to one at least of the attorneys whose names are appended to the assignment of errors." The only name (or names) "appended" to the assignment of errors in the case at bar is "Frazer & Frazer," designated "attorneys for appellant."

It should be observed and realized that the clerk is required to do nothing more than to mail the notice. There is no contention that the clerk failed to discharge that duty. It is apparent that counsel might have computed the time of submission for themselves. In cases like the one at bar the mailing

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of notice of submission by the clerk seems to be superfluous. Ewbank's Manual §178. The rule requiring that appellant's brief shall be filed within sixty days after submission is strictly enforced. Ewbank's Manual §179.

The appeal is dismissed.

WAGNER v. TREESH.

[No. 10,005. Filed December 12, 1919.]

1. **APPEAL.—Demurrer.—Statutory Provisions.—Scope of Review on Appeal.**—The Appellate Court is not by §344 Burns 1914, Acts 1911 p. 415, limited to the specifications set out in the memoranda, when reviewing rulings sustaining demurrers to the complaint and to the answer to the cross-complaint. p. 554.
2. **DIVORCE.—Judgment.—Property Rights.—Res Judicata.**—A decree of divorce by a court having jurisdiction of the subject-matter and parties is an adjudication of all property rights or questions growing out of or connected with the marriage, and the parties are precluded thereby as to all matters which might have been legitimately proved in support of the charges or defenses in the action. p. 554.
3. **DIVORCE.—Alimony.—Property Rights.—Knowledge of Facts.—Res Judicata.**—A decree for divorce containing a judgment for alimony obtained by a wife, is a bar to an action begun by her on the day the decree was rendered to compel a deed to her by her former husband and to quiet title in her to real estate bought during the coverture, the title to which was taken in the name of both parties, on the theory that the purchase price was paid by her out of her own estate, when it must be assumed from the complaint, from the absence of allegations to the contrary, that she knew at the time the contract for the deed was made, of its provision for a conveyance to husband and wife, and that she knew prior to the decree of divorce that the deed had not been made to her alone. p. 554.
4. **JUDGMENTS.—Divorce.—Alimony.—Scope of Issues.—Presump-**

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tions.—It is the duty of the court in the trial of divorce proceedings to make inquiry as to the amount of property owned by the parties and as to how the title was held, and to make the decree for alimony justified by the circumstances, and there is a presumption that the court performed those duties. p. 554.

5. **DIVORCE.—Alimony.—Property Rights.—Modification of Decree.**
—Where a wife, on the day a decree for alimony sought by her is rendered, learns for the first time that the title to certain real estate was joint and not in her alone as she had supposed, it is her duty to so inform the court, and it is proper for her to make an application to have the title adjudicated in that action and to have a proper judgment for alimony made. p. 554.

From DeKalb Circuit Court; *Dan M. Link*, Judge.

Action by Phoebe Treesh Wagner against Lewis E. Treesh. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Edgar W. Atkinson and *Sharpless & Beck*, for appellant.

Mountz & Brinkerhoff, for appellee.

McMAHAN, J.—The appellant and appellee were formerly husband and wife. A divorce was granted to appellant December 14, 1915, and she on the same day commenced this action against the appellee. An amended complaint was afterwards filed alleging said marriage and divorce, and charging in substance that on April 12, 1907, while she and appellee were husband and wife, she contracted for the purchase of certain real estate for the sum of \$1,300; that at that time she paid out of her individual money \$100 on the purchase price; that a contract for the purchase of said real estate was made to appellant and appellee jointly; that she paid the balance of the purchase price out of her own estate, the final payment being made in May, 1910 at which time a deed was executed in which appellant and appellee were named as

grantees; that she had no knowledge that it was so executed, but supposed that it was executed to herself only; that she did not intend to relinquish her right to said property, but intended to hold it as her own in her own name and believed, when the deed was so made, that she was holding the property to her sole use and benefit, and so continued to believe that she was the sole owner thereof until immediately prior to the beginning of this action; that appellee caused the title to said real estate to be so taken without her knowledge and consent, and that he claims an undivided one-half interest therein adverse to her. The prayer is that the conveyance of said real estate to appellant and appellee be declared a trust in favor of appellant; that appellee be required to execute a deed conveying said property to appellant, and that the title be quieted in her.

Appellee filed a cross-complaint for partition, to which appellant filed an answer in which she set out the same facts as stated in the amended complaint. Appellee then filed a demurrer for want of facts to the amended complaint, and also to the answer to his cross-complaint, which were sustained. Appellant refused to plead further, and judgment was rendered against her. The errors assigned are that the court erred in sustaining each of said demurrers. A memorandum filed with each demurrer challenged the sufficiency of the pleading, for the reason that the decree of divorce fully and finally adjudicated the property rights of the parties.

Appellant contends that under §344 Burns 1914, Acts 1911 p. 415, this court, in reviewing the action

of the trial court, is limited to the specifications set out in the memorandum. The Supreme Court, however, has ruled otherwise. *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471.

A decree of divorce by a court having jurisdiction of the subject-matter and the parties is an adjudication of all property rights or questions growing out of, or connected with, the marriage.

As a general rule, all such questions, unless excepted therefrom, are put at rest by the judgment, and the parties thereto are precluded thereby, until it is set aside in a proper proceeding. Such a decree precludes the parties as to all matters which might have been legitimately proved in support of the charges or the defenses in the action. *Walker v. Walker* (1898), 150 Ind. 317, 50 N. E. 68. See, also, *Wise v. Wise* (1918), 67 Ind. App. 647, 119 N. E. 501.

The complaint and answer now under consideration are singularly silent as to when the appellant learned that the contract for the purchase of the real estate provided that the conveyance should be made to herself and to the appellee, and also when she learned that she and the appellee were named as grantees in the deed. We are justified in assuming, and we shall assume, that she knew at the time the contract was executed that it provided that the conveyance when made should be made to herself and appellee jointly. In the absence of an allegation to the contrary, we conclude that she knew prior to the decree of divorce that the deed had been so made, notwithstanding the allegation that "she did not intend to relinquish her right to said property, but intended to hold it as her own, in her own name, and believed that when the deed was so made she was

holding the property to her sole use and benefit and continued to believe that she was the sole owner thereof, until immediately prior to the beginning of this action." The statement, "and believed when the deed was so made" is for all practical purposes an acknowledgment that she knew when the deed was made that she and appellee, her then husband, were named as grantees, although she may not have known the legal effect of the same.

There is no allegation that she did not intend that the deed should be made to herself and husband as provided in the contract of purchase. The allegation in the pleadings that she "continued to believe that she was the sole owner thereof until immediately prior to the beginning of this action" is not equivalent to saying that she did not know that the deed had been made to herself and husband. As we construe the allegations of the complaint and of the answer to the cross-complaint, she meant to convey the idea that, when the contract for the purchase of the real estate was made, she knew that it provided that the deed, when made, should be made just as it in fact was made and that, when the payments were all made, her husband, with her implied knowledge and consent, but without her express knowledge and consent, caused the deed to be made out in accordance with the terms of the contract.

With this knowledge she prosecuted her action for divorce and procured a decree of divorce and judgment for alimony, and, probably not being satisfied with the judgment for alimony, saw an opportunity in this action to secure the whole of the real estate in controversy. It will be remembered that the complaint in this action was filed the same day the decree for divorce was entered.

It was the duty of the court in the trial of the divorce proceedings to make inquiry as to the amount of property owned by the parties and as to how the title was held, and to make such a decree for alimony as the circumstances justified. The presumption is that the court did its duty in that behalf, and that the court before granting the divorce heard the evidence and was fully advised concerning the title to the real estate now in controversy, and that the decree for alimony was made in accordance with the facts. This action was commenced the same day that the decree of divorce was granted, and at a time when the court had jurisdiction to afford appellant all necessary relief, and to have made such changes or modifications in the decree for divorce as were proper. If the appellant knew that the deed to the real estate in controversy was made out in the name of herself and the appellee as grantees, it was her duty to have so informed the court. If she did not learn of that fact until after the divorce was granted, she had the right, and it was proper to bring such fact to the attention of the court, and by proper application to have had the title to the real estate adjudicated in that action, and in order that a proper judgment for alimony might be made.

It is not necessary for us to determine whether the appellant might or might not have maintained an action if it were charged that she did not learn of the condition of the title until after the decree of divorce had been granted and the court had lost jurisdiction, or if, through fraud, her husband had induced her to convey the real estate to him, and where the court did not hear evidence as to such title or consider

the same in allowing alimony, or where the title to the real estate was excepted from the decree.

There was no error in the action of the court in sustaining the demurrers to the complaint and answer to cross-complaint. Judgment affirmed.

IN RE HOWARD.

[No. 10,714 Filed December 12, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation.—Words and Phrases.—“Employment.”*—The word “employment,” as used in clause (c) of §76 of the Workmen's Compensation Act (Acts 1915 p. 392), means the general occupation in which the employe was engaged when he received his injury. p. 563.
2. MASTER AND SERVANT.—*Workmen's Compensation.—Concurrent Contracts of Employment.—Measure of Liability for Injury.*—Where one doing janitor service for different persons, under separate, concurrent contracts, known to each, was injured so that he died while so engaged for one of them, his dependents are entitled under §§37 and 38 of the Workmen's Compensation Act (Acts 1919 pp. 164, 165) to compensation from the employer for whom decedent was engaged when injured, based upon the total earnings regularly received from all such employers. p. 563.

Certified question from the Industrial Board of Indiana in proceedings under the Workmen's Compensation Act by the widow of John B. Howard, deceased.

REMY, J.—The Industrial Board of Indiana, pursuant to §61 of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 Burns' Supp. 1918), has certified to this court for determination a question of law based upon the following facts: For more than five

years prior to June 10, 1919, John B. Howard was a common laborer, and during all of that time was exclusively employed in janitor service. For more than a year immediately prior to June 10, 1919, he was employed under separate contracts of hire by three different employers, A, B and C. Employer A conducted an insurance agency, and during all of said year Howard was employed as office janitor. During all of the same year Howard was in the employ of B as janitor for his flat building, and likewise as janitor for a flat building that C owned and controlled. During all of said year A had paid to Howard a weekly wage of \$1.25; B a weekly wage of \$12.50; and C a weekly wage of \$4.25, making the total weekly earnings or wages of Howard for said year the sum of \$18. Each of said employers knew of the employment of Howard by the others, knew of the services performed, and the wages received. On June 10, 1919, while engaged in the line of his employment in washing windows for A, Howard lost his hold and fell to the sidewalk, thereby receiving injuries which resulted in his death on said date. A had actual knowledge of the injury to, and the death of, Howard at said time. Howard left surviving him as his sole dependent his widow, who was living with him as his wife at and prior to the time of his injury and death.

It is conceded that the widow is entitled to 300 weeks' compensation. Employer A contends that the weekly compensation should be based upon the weekly wage paid by himself, which, under §40 of the Workmen's Compensation Act, *supra*, would be \$5.50. The widow contends that she is entitled to compensation based upon the total wages or earnings received from Howard's employers, which, under §§37 and 38 of

the Workmen's Compensation Act as amended (Acts 1919 p. 158), would be \$9.90 per week. The question involves the construction of certain sections of the act. Said §37 provides: "When death results from the injury within three hundred weeks, there shall be paid a weekly compensation equal to fifty-five per cent. of the deceased's average weekly wages during such remaining part of three hundred weeks as compensation shall not have been paid to the deceased, on account of the injury in equal shares, to all dependents of the employee wholly dependent upon him for support at the time of the death."

Clause (c) of §76 of said act, among other things, provides: "'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of injury, divided by fifty-two."

Under these provisions of the act, the widow of Howard is entitled to a weekly compensation equal to fifty-five per cent. of the "average weekly wages" of her husband "in the employment in which he was working at the time of the injury" which resulted in his death. As applied to the facts of this case, what is the meaning of the expression "in the employment in which he was working at the time of the injury?" If it means only the employment of employer A whose windows he was washing when injured, then the widow will receive a weekly compensation of \$5.50. If the expression is construed to mean the employment of Howard by all of his employers, then the widow will receive a weekly compensation of \$9.90. The question presented is one of first impression in this state. We have for our guidance, however, the

conclusions of those who have specialized in workmen's compensation laws, and the decisions of courts of other jurisdictions where similar laws are in force. Honnold in his excellent treatise on Workmen's Compensation (Vol. 1, p. 585) says: "In the case of concurrent contracts of service—that is, contracts running concurrently in respect to successive and separate employment—the computation of weekly earnings as a basis of an award is to be made as if all the earnings were earned in the employment of the one who was employer at the time of the injury, provided the services are performed in the same occupation."

A case in all respects similar to the one at bar was before the California Supreme Court. *Western Metal Supply Co. v. Pillsbury* (1916), 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E 390. The facts of that case as stated in the opinion were as follows: "James Mason was employed as a night watchman by applicant, Western Metal Supply Company, and at the same time by five other corporations. He made regular rounds of the premises of the six employers. For his services he received thirty dollars per month from the applicant. The others for whom he acted as watchman paid him different sums, his aggregate monthly earnings from the six employers being \$116. The Western Metal Supply Company knew that he was acting as watchman for other employers, but did not know the number of such other employers nor the identity of all of them. Mason's employment was by separate agreement with each of his employers, and not by any joint agreement or joint employment. * * *, the dead body of said James Mason was found upon the premises of the Western Metal Supply Company, death having been caused by gunshot

wounds inflicted by unknown persons engaged at the time of the murder in committing burglary upon the said premises. * * * The commission awarded * * * compensation * * * based upon the aggregate amount which he received from his six employers." In discussing the question presented, the court said: "The statute contains no provision which can be said to point to a clear solution of this problem. Probably the framers of the act did not have in mind the specific case of a workman employed in a given capacity by different employers, to each of whom he rendered services for a portion of his time. It must be remembered, however, that the main purpose of the act is to indemnify the workman for the loss suffered by him. The indemnity takes two forms—the furnishing of medical attention, and payment of a proportion of the earnings lost in consequence of the injury. In case of death, the amount payable is a percentage 'of the average annual earnings of the deceased employee.' A fair compensation is to be paid to the employee, or to the dependents who have lost in him their source of support. It should be based upon the amount which the employee was in the habit of earning in the particular kind of employment, rather than the amount he had been receiving from a particular employer."

A like question was passed upon by the Supreme Court of Massachusetts in *Gillen's Case* (1913), 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A 371. In that case, Gillen, who was a longshoreman, was injured in the course of his employment by a steamship company; but, as was customary with longshoremen, he worked for other employers during each day or group of days. The question presented was whether his

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compensation was to be based upon all of his weekly earnings as longshoreman, or upon the wages or earnings paid by the employer for whom he was engaged at the particular time he received his injury. In the course of its opinion the Massachusetts Supreme Court says: "It is obvious from the broad scope of the act and its comprehensive dealing with the whole subject that it was intended to provide for the employe as compensation within the limits specified therein a definite proportion of the amount which he earned weekly. It cannot be presumed that the legislature intended to offer a scheme of accident insurance which would be illusory or barren to large numbers of workmen. 'Weekly wages' as used in the first sentence quoted above plainly means all the wages which the employe received in the course of a permanent employment, which are all the wages he receives. * * * Therefore, we reach the conclusion that average weekly wages as used in the clause of the act last quoted was not intended to apply to recurrent periods of brief service at regular intervals, in cases where the entire time of the workmen is devoted to like employment for other employers in the same general kind of business. * * * Although not stated in precise words, we think that the general import of the act is to base the remuneration to be paid upon the normal return received by workmen for the grade of work in which the particular workman may be classified. * * * The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based."

The statutes of California and Massachusetts, which were under consideration in the cases above

referred to, are very similar to the statute of this state which we are called upon to construe.

If Howard had been in the joint service of the three employers, then, under §49 of the Workmen's Compensation Act, *supra*, all of the employers would have contributed to the payment of the compensation in proportion to their respective wage liability. He was not in the "joint service" of his employers, but in the employment of all, under concurrent contracts of service. There is no provision in the act for the joint liability of employers who hold independent, concurrent contracts with the same employe. If the legislature had intended to make concurrent employers all liable for compensation in a case like the one at bar, it would in all probability have made special provision as it did with reference to joint employers.

Therefore, if the widow of Howard is to be compensated on the basis of the total average weekly earnings of Howard, it must be by employer

1-2. A whom he was serving at the time of his injury and death. The amount she should receive must depend upon the construction of clause (c) of §76, *supra*. The term "average weekly wages," used in §40 of said act, is defined in said clause (c) of §76 to be "*earnings of the injured employe in the employment in which he he was working at the time of the injury.*" Does this definition mean that the average weekly wages of Howard is the amount he was receiving from the one employer for whom he was washing windows at the time, or does it mean the amount he was receiving in his employment as janitor? What is meant by the words "in the employment"? Webster defines "employment" as "occupation, business, which engages head or hands."

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Worcester says "employment" means "business, occupation, object of industry, engagement, avocation, calling or profession." If we apply these definitions to the word "employment" as used in clause (c) of §76, *supra*, as we must, then, under the facts of this case, Howard's employment was that of janitor, and he was engaged in that employment for three employers, and was injured while so employed. It follows that the compensation to be paid to the widow should be based upon the total earnings received by Howard from his three employers.

Enloe, J., dissents.

MARTIN v. SEIBERT, ADMINISTRATOR, ET AL.

[No. 10,100. Filed December 12, 1919.]

1. GIFTS.—*Gifts Causa Mortis*.—*Requisites*.—*Delivery*.—To constitute a gift *causa mortis*, there must be a transfer or delivery of the property in expectation of death from an existing illness. p. 566.
2. GIFTS.—*Gifts Causa Mortis*.—*Requisites*.—*Delivery*.—*Evidence*.—A letter sent to one claiming certain money belonging to a decedent's estate as trustee under an alleged gift *causa mortis*, stating that the writer would make her money payable to claimant, and another letter to a bank, "As I have to go to a hospital and have an operation, and should anything happen to me, I make my money payable to" claimant, both letters having been written by decedent just prior to entering a hospital to submit to an operation, which resulted in her death, are insufficient to show a valid gift *causa mortis*, in the absence of a delivery of the money to claimant. p. 566.
3. APPEAL.—*Review*.—*Harmless Error*.—*Exclusion of Evidence*.—Where plaintiff would not have been entitled to a recovery in any event, exclusion of evidence offered by her was harmless. p. 566.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Martin v. Seibert, Admr.—71 Ind. App. 564.

In the matter of the estate of Julia S. K. Meyer, of which John Seibert was administrator. Petition by Lydia C. Martin, claiming certain money as trustee. From a judgment for the administrator, the petitioner appeals. *Affirmed.*

M. R. Sutherland and *R. N. Smith*, for appellant.

Frank E. Osborn, *Lee L. Osborn*, *Kenneth Osborn* and *M. E. Letleiter*, for appellees.

ENLOE, J.—Lydia C. Martin, petitioner, appellant, filed her petition in the LaPorte Circuit Court, claiming certain money as trustee under an alleged gift *causa mortis* made by the deceased Julia S. K. Meyer just prior to her death. A demurrer to the petition was overruled, answers and reply filed, and cause submitted to the court for trial, the venue having been changed to the St. Joseph Circuit Court.

The court found for the defendant and rendered judgment accordingly. Appellant's motion for a new trial having been overruled, this appeal is prosecuted, and the only error assigned is the action of the court in overruling the motion for a new trial.

This motion was based upon the following grounds: That the decision was not sustained by sufficient evidence; is contrary to law; and alleged errors in excluding certain offered testimony, which, in the view we take of this case, need not be considered.

The alleged gift was attempted to be founded upon two instruments in writing, written on the same day, and just prior to the writer's—Mrs. S. K. Meyer—entering a hospital at Springfield, Ohio, to be operated upon for tumor, and from which operation she died on the second day thereafter. The letter above referred to was, it appears, written to friends in Indiana, from the hospital in Springfield, Ohio, in which

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city the deceased was then living. That part of the letter to appellant, relied upon as constituting the gift, was as follows:

“I wish, dear Ma, you could be with me, but you cannot, I know. I will make my money payable to you, and if there should be anything happen to me, get a good stone and a vault for my grave. * * *”

The other letter was addressed to the LaPorte Savings Bank, LaPorte, Indiana, and was as follows:

“As I have to go to hospital and have an operation, and should there anything happen to me, I make my money payable to Mrs. L. C. Martin, LaPorte, Indiana. Was deposited Aug. 20, 1912, to Mr. Crumpacker, with 4% interest. Truly

“Mrs. Julia Silberstorf Kreidler Meyer.”

To constitute a donation *causa mortis*, there must be a *transfer, or delivery of the property*, in expectation of death from an existing illness. *Smith*,

1. *Admr., v. Dorsey* (1872), 38 Ind. 451, 10 Am.

Rep. 118, and authorities cited; *Smith, Admr., v. Ferguson* (1883), 90 Ind. 229, 46 Am. Rep. 216. In 3 Redfield, Wills, p. 327, it is said, in discussing requirements of a valid gift: “(3) There must be an actual delivery of the chattel to the donee so as to transfer the possession to him in order to constitute a good gift, *causa mortis*.”

There is no evidence in this record, nor was any offered, that tended even in any way to show an *actual delivery* of the money in question to the

2-3. appellant—a fact necessary to be shown before she could rightfully demand a judgment

in her favor. Until there was some evidence tending to establish this fact, there could be no prejudicial error in excluding the testimony offered. The judgment is therefore affirmed.

LAKE ERIE AND WESTERN RAILROAD COMPANY v.
DOUGLAS.

[No. 10,123. Filed December 12, 1919.]

1. RAILROADS.—*Crossing Accident.—Smoke and Noise.—Pleading.*—In an action for damages for injury by collision, a paragraph of complaint examined and *held* to state a cause of action on the theory that owing to smoke and noise produced by a passing train, the statutory signals, if given, of the approach of the colliding train, were imperceptible, and for failure to give other warning of the approach of the train and approaching at an excessive rate of speed under such circumstances. p. 574.
2. RAILROADS.—*Crossing Accident.—Last Clear Chance.*—Paragraph of complaint *held* good on the theory of last clear chance owing to the allegations of the surroundings of the parties, their being unconsciously in danger and of the knowledge of that fact by the engineer running the colliding passenger train. p. 575.
3. TRIAL.—*Verdict.—Effect.*—A general verdict for plaintiff finds in her favor every material allegation in the complaint. p. 576.
4. TRIAL.—*Interrogatories to Jury.—Answers.—Motion for Judgment on Answers.*—A motion for judgment on answers to interrogatories returned with a verdict is properly overruled when the answers and the verdict are not in irreconcilable conflict. p. 576.
5. TRIAL.—*Instructions.—Explanatory Instructions.—Construction.*—An instruction intended as explanatory of another requires that the two should be read and considered together as virtually one instruction. p. 579.
6. TRIAL.—*Instructions.—Burden of Proof.—Crossing Accident.*—In an action against a railroad for injuries at a crossing, an instruction that in effect told the jury that the railroad had the burden of showing freedom from negligence and that a showing that it had given the statutory signals under the circumstances

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did not relieve it of such burden, invaded the province of the jury and was erroneous. p. 579.

7. **NEGLIGENCE.—Common Law.—Jury Question.**—Common-law negligence is always a failure to use due care, of which the jury are the judges, and therefore always a question of fact for the jury. p. 579.
8. **RAILROADS.—Crossing Accidents.—Obstructions to View.—Instructions.**—In an action for injuries at a railroad crossing, evidence of things obscuring the view of approaching trains was proper to be considered by the jury in determining whether the plaintiff had exercised reasonable care for her own safety, and an instruction advising the jury that such evidence was to aid them in determining the degree of care and caution necessary on the part of the defendant should have been so limited. p. 580.
9. **RAILROADS.—Crossing Accident.—Contributory Negligence.—Evidence.—Instructions.**—An instruction on the subject of contributory negligence in a railroad crossing accident case that directs the jury to consider all facts and circumstances in evidence, should have been limited to the facts and circumstances existing or occurring prior to the time of the collision. p. 590.
10. **TRIAL.—Instructions.—Repetition.—Inapplicable.**—Instructions tendered but which are erroneous or inapplicable to the evidence, or covered by other instructions so far as correct, are properly refused. p. 581.

From Tippecanoe Superior Court; *James P. Watson*, Special Judge.

Action by Grace Douglas against the Lake Erie and Western Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

John B. Cockrum and *Stuart, Hammond & Stuart*, for appellant.

Charles V. McAdams, *Clyde H. Jones* and *Leonard J. Curtis*, for appellee.

ENLOE, J.—This was an action brought by appellee against appellant to recover damages for personal injuries alleged to have been sustained while riding in an automobile, and traveling eastward upon the highway known as the Montmorenci road at the point

where said road crosses the tracks of appellant, by being there struck, while crossing said track, by one of appellant's trains.

There were three paragraphs of the complaint, but, the first having been dismissed, the case was tried upon the second and third paragraphs, to each of which the appellant had separately demurred for want of facts, with memoranda of deficiencies required by the statute, which demurrers were by the court overruled, and to which action appellant had excepted. To each of said second and third paragraphs the appellant had answered in general denial. The cause was submitted to a jury for trial, which returned its verdict in favor of appellee, together with answers to certain interrogatories submitted to it by the court.

Appellant duly filed its motion for judgment in its favor upon these answers to interrogatories so made and returned by the jury, and also filed its motion for a new trial, each of which was overruled and exception duly taken.

The errors assigned and relied upon require a consideration of the questions hereinafter determined.

The first question to be considered is as to the sufficiency of the second paragraph of the complaint. This paragraph of complaint is quite lengthy and no good purpose would be served by setting out the same in its entirety. In this paragraph of complaint the facts are alleged showing the physical surroundings of said crossing and its unusual dangers at the time appellee and those with whom she was riding attempted to cross the tracks of appellant at the point in question. The negligence charged in this paragraph relates to the manner in which the passenger train, by

which appellee was then and there struck, was then and there being run and operated by the servants of appellant. This paragraph of complaint, among other things, avers that, as appellee and those with whom she was riding approached said crossing, traveling toward the east, they discovered a freight train approaching said crossing from the east; that appellant's track at that point, and for some distance to the east and west thereof, was on an up-grade to the west; that said freight train was being moved by two engines, one in front and the other in the rear acting as a "pusher"; that said train consisted of sixty-two freight cars and was a long and heavy train; that the engines moving the same were laboring hard; that said freight train, as it reached and passed over said crossing, was moving at the rate of about ten miles per hour; that the day was cloudy; that the time of day was about 5 o'clock p. m.; that an easterly wind was blowing; that the said engines attached to said freight train were emitting great volumes of black smoke, which came over and settled down on the westerly side of said train; that the smoke from the engines concealed and shut off the view of appellant's track to the west and rendered it impossible to see a train approaching from that direction; that the great noise made by the engines attached to said freight train and the noise and rumbling made by said train in motion made it impossible for appellee to hear the ordinary signals given by a train approaching said crossing from the west. This paragraph of complaint then avers: "And that all of such facts were open and visible to all servants of the defendant so operating such passenger train as aforesaid, and were plainly visible to them, and the

plaintiff avers that the operation and proximity of such freight train on the opposing track as aforesaid, making the noises as aforesaid, and being near to such crossing and the plaintiff, prevented all signals by whistle or bell given by said passenger train from being heard at such crossing, and the same were not heard if given, and the plaintiff avers that the servants of the defendant well knew, or by the exercise of ordinary care and foresight should have known, that signals of whistle and bell given by such passenger train when not less than eighty nor more than one hundred rods from such crossing could not be heard at such crossing on account of the noises made by such freight train and engines pulling and pushing the same, and the plaintiff avers, that notwithstanding such facts and knowledge, the servants of the defendant ran such passenger train upon such crossing at such high and excessive speed as aforesaid, and she says that the defendant was careless and negligent in not adopting some other reasonable and prudent method of notifying her of the approach of such train, and was so careless and negligent in so operating the same at such excessive speed, knowing that the signals ordinarily given of its approach to such crossing could not be heard, and was careless and negligent, knowing such signals could not be heard for the reasons aforesaid, in not operating and running such train at a rate of speed which would have enabled its engineer to stop the same in case of emergency; and the plaintiff says that it was practicable to have so operated the same at a moderate rate of speed and have prevented the accident and injury to the plaintiff had the defendant and its

servants exercised ordinary care in the operation of such train.”

The complaint further avers that appellee’s injuries as in said complaint set forth were caused solely on account of the acts of negligence by the appellant, its servants and agents as therein averred, and not otherwise.

The third paragraph of complaint, as to the description and surroundings of said crossing, is in its allegations similar to the second, but said paragraph further alleges that: “When the locomotive of such passenger train was more than twenty-five hundred feet from such crossing, the servants in charge of such locomotive, including the engineer who was operating the same saw the automobile in which the plaintiff was riding, standing within a few feet of such crossing, and believed that said automobile would start forward across said track as soon as the freight trains had cleared the same.

“And the plaintiff avers that the said engineer and other servants in charge of said locomotive engine continued to observe said automobile in which the plaintiff was riding from the place where said servants first observed such automobile as aforesaid, and the said engineer and said servants saw said automobile start forward and move toward said track, and such servants in charge of said engine knew that such automobile in which the plaintiff was riding was entering a place of danger and peril from which the occupants of said automobile would be unable to extricate themselves. That said engineer and servants in charge of said locomotive engine knew that the occupants of said automobile did not know of the approach of said locomotive engine in charge of said

passenger train being run at such a high and dangerous rate of speed, and the plaintiff avers that notwithstanding the fact that the plaintiff was unconsciously entering into a place of danger and peril, and notwithstanding the servants in charge of said engine knew that the plaintiff was entering into a place of danger and peril from which she would be unable to extricate herself, the servants in charge of said locomotive engine carelessly and negligently after having such knowledge, continued to run and propel such engine at such high and dangerous rate of speed, without making any effort whatever to stop or check the same and without making any effort to give any other or additional warning to the plaintiff until within a few feet of said crossing, and the plaintiff avers that such locomotive engine so run and operated at such high and dangerous rate of speed continued to be run and operated at such speed to and against the automobile in which plaintiff was at the time riding. That such passenger locomotive and train struck such automobile in which plaintiff was riding with great force and violence, thereby and on account thereof plaintiff was injured in the following manner: (Here the injuries are stated.)

“The plaintiff further avers that the servants in charge of said locomotive engine could easily have stopped or checked said engine and could have avoided collision with such automobile after they knew and realized that the plaintiff was entering into a place of peril from which she would be unable to extricate herself, but they carelessly and negligently refused so to do.”

We first consider the sufficiency of said second paragraph. In the case of *Chicago, etc., R. Co. v. Still*

(1858), 19 Ill. 499, 71 Am. Dec. 236, it was said:

1. "Railroad companies, in operating their cars, must be held, in crossing public highways and thoroughfares, to so regulate the speed of their trains, and to give such signals to persons passing, that all may be apprised of the danger of crossing the railroad track. And they should also keep a look-out, so as to see, and, as far as possible, prevent injury to others exercising their legal rights. A failure in any of these duties, on their part, should render them liable for injuries inflicted, and for wrongs resulting from its omission."

In the case of *Chicago, etc., R. Co. v. Perkins* (1888), 125 Ill. 127, 17 N. E. 1, which was a crossing case, it was said: "If a railroad company, in the running of its trains, had no duty to perform except what the legislature might prescribe, the position of counsel might be well taken; but such is not the case. A railroad company, in the running of its trains, is required to use ordinary care and prudence to guard against injury to the person or property of those who may be traveling upon the public highways and are required to cross its tracks, whether required by the statute or not. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety and common prudence may dictate."

In the case of *Continental Improvement Co. v. Stead* (1877), 95 U. S. 161, 24 L. Ed. 403, in which case the cause of action arose in Indiana, the court said: "We think it is in accordance with well-settled law and with good sense. If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of

crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties * * *: it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely."

In the case of *Bellefontaine R. Co. v. Hunter* (1870), 33 Ind. 335, 366, 5 Am. Rep. 201, the court said: "On the other hand, the company are required to keep a reasonable lookout at public crossings and to give such signals of their approach as are calculated to notify the public, when without such signals, and in the exercise of the proper care and caution by the public, their proximity would not otherwise be known. Thus, if the track were concealed from view, and the sound of the train from high wind or any other cause was destroyed, it would devolve upon the company to use any other usual and proper method to give notice to passengers upon the highway."

The court did not err in overruling the demurrer to this paragraph of complaint.

The third paragraph of complaint is addressed to the theory of last clear chance. The allegations there-

in contained as to the surroundings of the
2. parties, their being unconsciously in danger,
and of the knowledge of that fact by appellant's engineer running said passenger train, clearly make this paragraph good upon that theory. *Terre*

Haute, etc., Traction Co. v. Stevenson (1920), 189 Ind. 100, 123 N. E. 785.

It is next urged that the court erred in overruling appellant's motion for judgment in its favor, upon the answers to interrogatories returned by the jury, notwithstanding the general verdict.

The general verdict is, in effect, a finding in appellee's favor as to every material allegation in her complaint. It is, in effect, a finding that the engi-

3-4. neer on appellant's engine saw and knew that,

by reason of the wind and smoke, the appellee and those with her could not hear his crossing signal nor see the approach of his train, and that he took no steps to reduce the speed of his train so that it might be brought under control, in case of emergency, and travelers upon the highway saved from an injury; that he took no precaution to give other and additional signals, that travelers on such highway might have due and timely warning of approaching danger; that he saw the appellee, and those with her, before they attempted to cross said track, and knew that they were about to start the automobile and attempt to cross; that by reason of the sound and smoke they were in a condition of peril; that his train was then running at a high rate of speed, and appellee and those with her would not have time to make the crossing safely before his train would be upon them to injure them; that said engineer could then have checked the speed of his train and so brought it under control that the injury would not have been occasioned, all of which he failed to do, thus causing the injury complained of. The answers of the jury relied upon as showing contributory negligence were

not in irreconcilable conflict with the general verdict, and there was no error in overruling said motion.

It is next urged that the court erred in overruling appellant's motion for a new trial.

In this motion it is assigned, among other reasons, that the court erred in giving certain instructions at the request of the appellee.

Among other instructions thus challenged are the ninth and tenth of said instructions, which read as follows: "9. The law of this state requires a railway company, such as the defendant, when operating a train over its railroad in this state, as the defendant was operating its train which is alleged to have caused the injury sued for in this case, to sound the whistle attached to the locomotive moving such train three times when not less than eighty or more than one hundred rods from any highway crossing over which the train is to pass, and to ring the bell attached to such locomotive continuously from the time of sounding the whistle until the locomotive has cleared the highway crossing. The neglect of the railway company to observe this law and so sound the whistle and ring the bell is negligence as defined by the court in these instructions. The jury, however, is instructed that the plaintiff in this case by her complaint does not charge the defendant with failure to so sound the whistle and so ring the bell as required, but charges in substance and effect, that at the time and place of the accident the conditions were such that the giving of the signals by whistle and bell, if given, were such that they could not be heard at the crossing in question where and when the accident occurred and that such conditions were produced by the defendant causing a freight train controlled by it to be operated

over the opposing double track of its railroad at the point of crossing and at the same time when the train which was in collision with plaintiff was approaching the crossing on the other opposing track of the defendant, and that such freight train and the engines pulling the same up grade gave forth such loud and deafening noises as it passed over such railroad at the time and place where the other engine was required to give such signals and at the time and place where the plaintiff was on the highway, that such signals, if given, could not be heard and were not heard by plaintiff, and it is further charged that such conditions were such and so apparent that the agents and servants of the defendant operating the train which caused the accident, knew or by the exercise of ordinary care should have known that the signals required by whistle and bell if given, could not be heard by persons approaching the crossing or such highway. Therefore, you are instructed that if conditions were such at the time and place of the accident, as alleged in the complaint, that the signals required by whistle and bell, if given, could not be heard and were not heard if given, and that such conditions were produced by the defendant by another train under its control, or if produced as alleged in the complaint, but not by the defendant but that the agents and servants of the defendant knew or by the exercise of ordinary care should have known that the signals if given could not be heard on account of such conditions existing at the crossing, then in either of such cases the situation is the same as if the signals had not in fact been given."

"10. In other words the last preceding instruction means that if the signals given were ineffective

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and useless, and rendered so on account of the acts of the defendant or others under its control or if rendered so ineffective by the acts of others not under its control, but the servants and agents in charge of its train knew, or by the exercise of ordinary care should have known on account of such conditions that the signals would prove ineffective then the fact that they, the signals, were given, *does not relieve the defendant of the charge of negligence.*" (Our italics.)

The tenth instruction is aimed to be explanatory of the ninth, and the two should therefore be read and considered together, as being virtually one in-

5-7. struction. Persons are "relieved" of burdens, and for the appellant to be relieved could only mean that some burden rested upon it. What burden? Evidently the burden cast upon it by the charges of negligence contained in the complaint. These charges of negligence were stated by the court in its second instruction to be: (1) Failure to give other than statutory signals and warning of the approach of this train to the highway crossing; (2) negligent operation of said train at a high and dangerous rate of speed; and (3) neglect of appellant to perform duties which it owed to appellee, after discovering and knowing her peril, under the doctrine of last clear chance. Did either of these specifications of negligence, charge negligence, as a matter of law, negligence *per se*, or was the question of negligence still one for the determination of the jury? Violation of a duty prescribed by statute or ordinance of a city is negligence *per se*, but common-law negligence is always a failure to use due care, of which the jury are the judges, and is therefore always a question of fact for the jury. The effect of these in-

structions was to tell the jury that the appellant had the burden of showing freedom from negligence and that a showing that it had given the statutory signals at the time and place in question did not relieve it of such burden. Clearly, it invaded the province of the jury and was erroneous.

Complaint is also made of the fourteenth instruction, given at the request of appellee. This instruction told the jury that the allegations of the

8. complaint concerning smoke obscuring the track, trees, weeds and foliage, obscuring the view of approaching trains, the conformation of the ground in the vicinity of crossing, were not allegations of negligence, upon which the cause of action was predicated, but were only to be considered along with the acts of negligence charged, for the purpose of aiding the jury in determining the degree of care and caution necessary to be exercised by the defendant, etc. The things mentioned in this instruction were proper to be considered by the jury, *if proved*, not for the purpose of enabling them to determine the *degree of care and caution to be exercised* by the defendant, but for the purpose of enabling them to determine whether the plaintiff, appellee, had as a matter of fact *exercised reasonable care* for her own safety, at the time in question, under all the circumstances and surroundings, and should have been so limited. The law fixed the degree of care, and it was for the jury to say whether that degree required by the law had been exercised.

The last clause in instruction No. 20, of those given at request of appellee, and which instruction is also objected to by appellant, is as follows:

9. “* * * if you find such facts are shown by the evidence, along with all other facts and cir-

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umstances that may appear in the evidence in this case." The instruction of which the above is a part was on the subject of contributory negligence by appellee, and should have been limited to "facts and circumstances" existing as occurring prior to time of collision by which she was injured.

Other instructions given we do not think to be open to the objections urged against them.

As to the instructions tendered by appellant and refused, we have carefully considered each and all of them, and they are either erroneous or not ap-

10. plicable, and therefore would have been misleading; or they were covered, so far as correct, by other instructions given.

As this cause must be reversed because of the giving of the foregoing instructions, other assigned errors need not be considered.

The judgment is therefore reversed, with directions to the trial court to sustain appellant's motion for a new trial, and for further proceedings.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. RETZ.

[No. 10,135. Filed December 12, 1919.]

1. **CARRIERS.—Carriage of Passengers.—Assault Upon Passenger.—Action.—Complaint.—Sufficiency.**—In an action against a railroad company for damages for an assault and battery claimed to have been inflicted upon plaintiff while he was a passenger on defendant's train, a complaint alleging that defendant's brakeman could easily have prevented the assault, but wrongfully, negligently and

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unlawfully, and in disregard of his duty, stood by and permitted the assault to be committed upon plaintiff and made no effort or attempt to prevent the same, states a cause of action. p. 584.

2. *APPEAL.—Briefs.—Statement of Evidence.—Sufficiency.—Waiver of Error.*—Where, though a large number of witnesses testified, appellant merely set out in its brief its conclusion of what the evidence showed together with only a part of the testimony of one witness, there was not a sufficient compliance with Rule 22, cl. 5, of the Appellate Court, requiring a condensed recital of the evidence in narrative form, and all questions depending on the evidence are waived. p. 585.
3. *EVIDENCE.—Admissibility.—Passenger's Action for Assault.*—Where the first paragraph of complaint alleged that plaintiff, while a passenger on defendant railroad company's train, was assaulted by an employe of defendant, and the second paragraph alleged that defendant's brakeman could easily have prevented the assault, but negligently failed to do so, evidence by plaintiff's witnesses as to the facts concerning the assault was admissible without first showing that plaintiff's assailant was a servant of the company. p. 585.
4. *TRIAL.—Evidence to be Made Competent by Connecting Evidence.—Admission.—Failure to Introduce Connecting Evidence.—Necessity of Motion to Strike Out.*—Where the court permits the introduction of evidence on the undertaking of counsel that other evidence will be introduced to make it competent, and such connecting evidence is not produced, the proper practice is to call the court's attention to the matter and move to strike out the evidence claimed to have been erroneously admitted. p. 586.
5. *APPEAL.—Questions Reviewable.—Exclusion of Evidence.—Necessity of Offer to Prove.*—No error is shown in the refusal to allow a witness to answer a question in the absence of an offer of proof as to the testimony which would have been elicited. p. 586.
6. *APPEAL.—Review.—Refusal of Instructions.*—The court on appeal cannot determine whether the refusal of a requested instruction, which was a correct statement of law, was reversible error in the absence of the evidence from the record. p. 586.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Action by Frank Retz against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Pittsburgh, etc., R. Co. v. Retz—71 Ind. App. 581.

F. C. Focht, W. G. Butler and John L. Rupe, for appellant.

Joseph R. Morgan, A. R. Feemster and W. G. Parry, for appellee.

McMAHAN, J.—This is an action brought by the appellee against the appellant for damages for an assault and battery alleged to have been inflicted by one Isaac Burns upon appellee while he was a passenger upon one of appellant's trains.

The complaint is in two paragraphs. The first paragraph alleges that Burns was an employe of appellant at the time of the alleged assault and battery, and was acting within the scope of his employment. The second paragraph alleges that the brakeman of appellant upon the train was present at the time, and could have prevented Burns from committing such assault and battery, but that he negligently and wrongfully stood by and permitted Burns to commit such assault and battery. Appellant's demurrer to each paragraph of the complaint was overruled and exception reserved. The cause was tried before a jury in Wayne county and resulted in a verdict in favor of appellee. A new trial was granted, and the cause was transferred on a change of venue to Randolph county, where it was again tried by a jury and resulted in a verdict and judgment in favor of appellee.

Appellant filed its motion for a new trial, the specifications thereof being that the verdict of the jury is not sustained by sufficient evidence, is contrary to law, that the damages are excessive, that the court erred in giving and in refusing to give certain instructions, and in the admission and exclusion of cer-

tain evidence. The errors assigned and not waived are the overruling of the demurrer to the second paragraph of complaint, and the overruling of the motion for a new trial.

The appellant contends that the brakeman had no authority on the train, that appellant cannot be held liable because the brakeman did not encourage

1. or direct an act, but was simply passive, and for that reason the court erred in overruling the demurrer to the second paragraph of complaint. It will be observed that this paragraph of complaint alleges that: The "brakeman could easily have prevented said Burns from making said assault and battery upon him, but wrongfully, negligently and unlawfully and in disregard of his duty stood by and permitted said Burns to strike, beat and cut said plaintiff as aforesaid, and to commit said assault and battery upon him and made no effort or attempt to prevent the same." On the authority of *Pittsburgh, etc., R. Co. v. Richardson* (1907), 40 Ind. App. 503, 82 N. E. 536, we hold that there was no error in overruling the demurrer to this paragraph of the complaint.

Passing next to the contention of appellant that the court erred in overruling its motion for a new trial, appellee insists that the specifications in the motion for a new trial that the verdict is not sustained by sufficient evidence and is contrary to law are not properly presented for our consideration, and cannot be considered by the court for the reason that appellant has failed to set forth in its brief a condensed recital of the evidence as required by the fifth clause of Rule 22 of this court.

A large number of witnesses testified in this case,

but appellant in its brief sets out only a part of the testimony of one witness, and shows that a con-

2. siderable portion of the evidence has been omitted except for a conclusion of the author of the brief as to what the evidence shows. This is not sufficient. That which is required by the rule is the substance of what the several witnesses have said in giving their testimony. This rule has been in force long enough, and construed by the courts often enough, so that there is no excuse for the failure of appellant to comply with it. This is essentially true where appellee has called appellant's attention to the failure and no attempt has been made to correct the omission. A failure to comply with this rule operates as a waiver of all questions depending upon the evidence. *Rose v. City of Jeffersonville* (1916), 185 Ind. 577, 114 N. E. 85; *McClellan v. Thomas* (1915), 183 Ind. 310, 109 N. E. 44; *Cleveland, etc., R. Co. v. Hayes* (1914), 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; *Leedy v. Idle, Trustee* (1918), 69 Ind. App. 105, 121 N. E. 323; *Jeffersonville School Tp. v. School City, etc.* (1912), 50 Ind. App. 178, 96 N. E. 662.

Appellant objected to each of appellee's witnesses testifying to the facts concerning the alleged assault and battery by Burns upon the ground that no

3. evidence had been introduced connecting the appellant in any way with Burns so that the company could be held responsible for his acts. The appellant concedes that it is not always practical for the court to interfere with the order in which testimony shall be given, but insists that the court should have required the appellee to have established at least a *prima facie* case of agency before permitting the witnesses to testify concerning the alleged assault

and battery by Burns. Under the second paragraph of complaint, this evidence was competent, even though Burns was not an agent of the appellant, inasmuch as it was there alleged that the brakeman wrongfully and negligently permitted the assault and battery. There was therefore no error in permitting the witness to testify as to the acts without first showing that he was acting as agent of appellant at the time.

It frequently happens in the trial of cases that the court erroneously permits a party to introduce evidence where counsel undertake to introduce

4. other evidence such as will make it competent and fails. Where evidence has been thus admitted, the proper practice is upon the failure to introduce such connecting evidence to call the attention of the court to such failure and move to strike out the evidence claimed to have been erroneously admitted. *Heady v. Brown* (1898), 151 Ind. 75, 49 N. E. 805, 51

N. E. 85. Appellant also contends that the

5. court erred in refusing to allow the witness Burns to testify in answer to a question whether at the time of the alleged assault and battery he was acting as a deputy sheriff. No offer to prove was made by appellant, and no error is therefore shown in the action of the court in refusing to allow the witness to so testify.

Appellant next contends that the court erred in refusing to give to the jury instruction No. 6 tendered by appellant. This instruction related to the

6. defense of self-defense, and, while it was technically correct, we cannot in the absence of the evidence say that a refusal to give it was reversible error. The court, however, did give three instruc-

Campbell v. Carroll—71 Ind. App. 587.

tions relative to the doctrine of self-defense, and thereby fairly covered the subject. The refusal of the court to give this instruction may have been for the reason that it was not applicable to the evidence. The case appears to have been fairly tried, and the failure to give said instruction did not in our judgment affect any substantial right of the appellant or constitute reversible error.

The determination of all the other questions urged as reason for a reversal depends upon the evidence and are not properly before us on account of the failure of appellant to give a condensed recital thereof as required by Rule 22.

There being no reversible error shown, the judgment is affirmed.

CAMPBELL v. CARROLL ET AL.

[No. 9,921. Filed October 7, 1919. Rehearing denied December 12, 1919.]

1. **BASTARDS. — Acknowledgment. — Evidence of Denial. — Competency and Scope.**—In an action to quiet title to a decedent's real estate, evidence of deceased's denials that he was the father of claimant, a bastard, along with other declarations and acts in relation to the paternity of claimant, was competent for determining whether there was an acknowledgment, but not for the purpose of defeating an acknowledgment once actually made, and it was reversible error to exclude it. p. 589.
2. **BASTARDS. — Acknowledgment. — Requisites. — Certainty and Definiteness. — Record Showing Compromise of Bastardy Proceeding. — Competency.**—Acknowledgment of the paternity of a bastard child must be definite, certain and unequivocal, and in an action involving the right of a bastard to inherit deceased's property,

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the record of a bastardy proceeding against deceased, which was compromised, containing no admission of paternity, was inadmissible in evidence. p. 590.

3. **APPEAL.—Review.—Refusal of Instructions.—Instructions Inapplicable to Evidence.**—It is not error to refuse a requested instruction containing elements upon which there is no evidence. p. 591.
4. **APPEAL.—Review.—Refusal of Instructions.—Failure to Include in Brief.**—An instruction objected to as erroneous, but not set out in appellant's brief, will not be considered on appeal. p. 591.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by Margaret Campbell against Camie Campbell and another. From a judgment in favor of the plaintiff and defendant Farris Carroll, the defendant Camie Campbell appeals. *Reversed.*

John A. Titsworth, Meiks & Hack and *B. F. Watson*, for appellant.

Marcus R. Sulzer, Solomon J. Bear, John H. Kiplinger and *Donald L. Smith*, for appellees.

NICHOLS, P. J.—This was an action by the appellee, widow of Ovid Campbell, deceased, against the appellant, who was the mother of said deceased, and the appellee Farris Carroll, originally in the Shelby Circuit Court, but, on change of venue, it was tried in the Rush Circuit Court.

It is averred in the complaint that Ovid Campbell, of Shelby county, Indiana, died intestate, on July 23, 1915, owning certain real estate and personal property, leaving as his only heirs at law his widow, the appellee Margaret Campbell, and his mother, Camie Campbell, and that the appellee Farris Carroll was asserting an interest in said property without right. There was a prayer to quiet title as to appellee Farris Carroll, and for partition as between appellant and appellee Margaret Campbell. Appellee Farris Car-

roll, by his cross-complaint, claimed to be the issue of said Ovid Campbell, deceased, by one Nora Carroll, born out of wedlock, and acknowledged as such issue in his lifetime by said Ovid Campbell and, by reason of such facts, an heir at law of said Ovid, and as such the owner of the undivided one-half of the estate of said Ovid. By appellee Carroll's supplemental cross-complaint, and by appellee Margaret's supplemental cross-complaint, it appears that, after the commencement of the action, said Carroll sold to said Margaret the undivided one-half of his interest in the estate as claimed by him, being the undivided one-fourth part of said estate, that at the trial he claimed the undivided one-fourth of the estate and said Margaret claimed the undivided three-fourths thereof, claiming no interest in the undivided one-fourth thereof, which interest was in controversy between appellant and appellee Carroll. There was a trial by jury, and a verdict in favor of the appellees that appellee Margaret owned three-fourths of said estate and appellee Carroll owned one-fourth thereof, and that appellant had no interest therein. After a motion for a new trial, which was overruled, this appeal was taken.

The error assigned is that the court erred in overruling appellant's motion for new trial. The court excluded from the jury certain evidence ten-

1. dered by the appellant to the effect that Ovid Campbell denied that Farris Carroll was his child, divers witnesses produced before the court and jury being ready to so testify. Appellant contends that this was error. It does not appear by appellant's statement of the evidence that Ovid Campbell ever admitted that he was the father of appellee, but, by appellee's brief, it appears that statements were in-

troduced in evidence in which he admitted that Farris Carroll was his son, and that the denials were offered in evidence to disprove that he did make such statements. In the case of *Haddon v. Crawford* (1912), 49 Ind. App. 551, 97 N. E. 811, it was held that such statements of denial would be proper in evidence, but only for the purpose of determining whether or not the acknowledgment was in fact ever made and intended, but not for the purpose of defeating such acknowledgment once actually made and intended. In the cases of *Houghton v. Dickinson* (1907), 196 Mass. 389, 82 N. E. 481, and *Miller v. Pennington* (1905), 218 Ill. 220, 75 N. E. 919, 1 L. R. A. (N. S.) 773, statements contrary to acknowledgments were admitted in evidence. In the case of *Robertson v. Campbell* (1914), 168 Iowa 47, 149 N. W. 885, denials were heard to rebut a claim of recognition of the paternity of the child. Evidence of these denials, along with all other declarations and acts of Ovid Campbell in relation to the paternity of Farris Carroll, were competent in evidence for the purpose of determining whether there was an acknowledgment, and it was reversible error to exclude it.

The appellant complains that the court committed reversible error in admitting in evidence, over appel-

lant's objection, the record of a bastardy proceeding, in which Ovid Campbell was charged with the paternity of appellee Carroll. The proceeding was before a justice of the peace, and was compromised, the record showing that the parties "agree to compromise this cause upon the following terms, to wit: The defendant pays the relatrix the sum of \$50.00 in cash this day, and executes two notes of even date herein for \$125.00, each payable in one

and two years from date, and payable to Martha Carroll, trustee for Nora Carroll, the relatrix herein being under the age of 21 years, and the said trustee being her mother." There is no admission or acknowledgment of paternity in the record. It may not even be implied from such a record of compromise. Many men would submit to such a wrong as this, if wrong it may be, rather than to submit to the embarrassment of a public trial and the gibes of the rabble who usually gather on such occasions. The acknowledgment must be definite and certain, and must be one in which the paternity of the child is plainly and unequivocally acknowledged. *Holloway v. McCormick* (1913), 41 Okla. 1, 136 Pac. 1111, 50 L. R. A. (N. S.) 536; *Moore v. Flack* (1906), 77 Neb. 52, 108 N. W. 143; *Pederson v. Christofferson* (1906), 97 Minn. 491, 106 N. W. 958; 7 Cyc 949. The record of compromise should not have been admitted. *Martin v. State* (1878), 62 Ala. 119; *Olson v. Peterson* (1891), 33 Neb. 358, 50 N. W. 155; *Lisy v. State, ex rel.* (1897), 50 Neb. 226, 67 N. W. 768.

It was not error to refuse to give instruction No. 4, tendered by appellant, for the reason that it contains a number of elements upon which there was 3-4. no evidence whatever. Instruction No. 28 undertakes to define an acknowledgment and the manner in which it may be made, and follows substantially the definition and rule in *Townsend v. Meneley* (1906), 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321. It was not erroneous. Instruction No. 29 is not in the brief, hence will not be considered. Appellants point out no reason why instruction No. 30 is not a correct statement of the law as applied to the case, and we see none.

The judgment is reversed, with instructions to grant a new trial.

BRACKNEY ET AL. v. BOYD ET AL.

[No. 10,062. Filed June 17, 1919. Rehearing denied December 12, 1919.]

1. **APPEAL.—Briefs.—Points and Authorities.—Waiver of Alleged Error.**—Alleged errors not contained under appellant's "Points and Authorities" are waived. p. 597.
2. **MORTGAGES.—Foreclosure.—Assistance, Writ of.—Petition.—Sufficiency.**—A proceeding for a writ of assistance to obtain possession of real estate after sale under foreclosure of mortgage is summary, being supplemental to and a part of the foreclosure proceeding and to give full effect thereto, and since it is not based on any written instrument, the petition need not set out the sheriff's deed nor a copy of the notice of the application for the writ. p. 597.
3. **ASSISTANCE, WRIT OF.—When Available.—Settled Law.—Resort** may be made to the writ of assistance when the right to possession is clear and without *bona fide* question by reason of the settled law of the state. p. 597.
4. **BOUNDARIES.—City Lots.—Streets and Alleys.—Dedication.—Title.**—A conveyance of a lot in a town or city designated by its number or other proper description, and abutting on a street or alley, carries with it in general the fee to the center of the street, and where the street or highway has been wholly made from and upon the margin of the grantor's land, such a conveyance will carry with it the fee to the whole of the street dedicated. pp. 597, 600.
5. **BOUNDARIES.—City Lots.—Mortgage Foreclosure.—Sheriff's Deed.**—The rule that a conveyance of a town or city lot carries a fee in the street adjoining is applicable to mortgages and deeds made by the sheriff upon foreclosure of mortgage. p. 598.
6. **MORTGAGES.—Foreclosure.—Judges.—Special Judges.—Assistance, Writ of.**—The powers of a special judge in mortgage foreclosure proceedings extend to putting the purchaser at the sale in possession by writ of assistance. p. 599.

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7. **MORTGAGES.**—*Assistance, Writ of.—Pleading.—Cross-Complaint.*
—In a proceeding for a writ of assistance to put the purchaser under foreclosure in possession, a cross-complaint seeking to quiet the title to the real estate involved was properly stricken out.
p. 599.

From Putnam Circuit Court; *John H. James*, Special Judge.

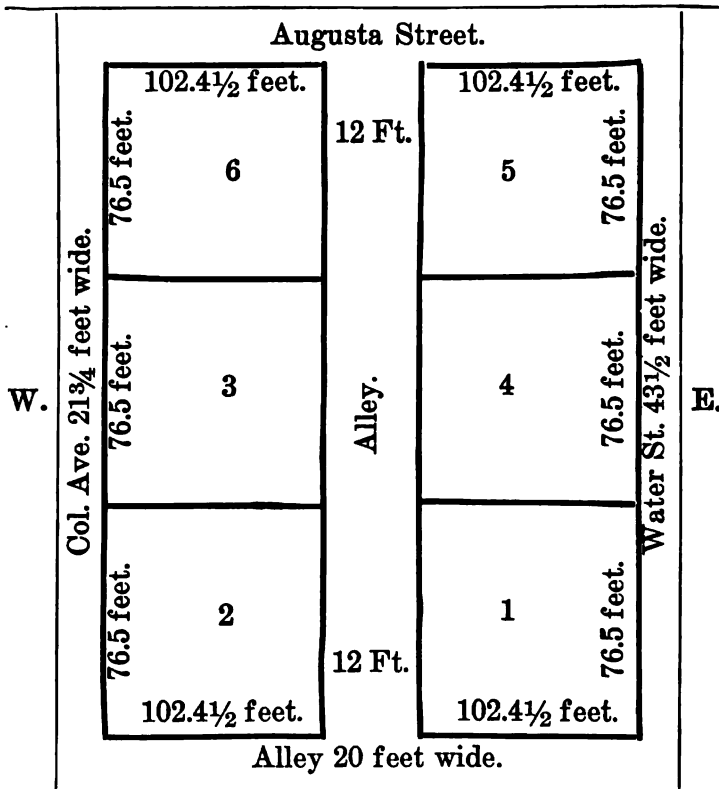
Proceeding by Ida Cullen Boyd and Jackson Boyd for a writ of assistance on the petition of the latter, against Daniel C. Brackney and another. From a judgment for the petitioner, the defendants appeal.
Affirmed.

Fay S. Hamilton and *Thomas A. Moore*, for appellants.

Lyon & Peck and *Jackson Boyd*, for appellees.

NICHOLS, P. J.—The appellants were the owners of lots numbers 1 to 6, inclusive, Higert's subdivision in the city of Greencastle, Indiana, and executed their mortgage thereon to the appellee Ida Cullen Boyd. After the making of said mortgage the said Higert's subdivision, including said lots, and streets and alleys abutting them, was duly vacated according to the law and the easement of the public removed therefrom. The situation is better understood by reference to, the following plat:

N.



S. W. Cor. Lot 19.

S.

Thereafter, to wit, on August 9, 1912, said appellee Ida Cullen Boyd commenced suit in the Putnam Circuit Court against the appellants to foreclose said mortgage. A change of venue was taken from the regular judge of said court, and the Honorable John H. James was appointed and duly qualified to try said cause, and upon the trial thereof entered a judgment and decree, in favor of said Ida Cullen Boyd

and against the appellants, foreclosing said mortgage.

The sheriff sold said land by virtue of the authority of a certified copy of the foreclosure judgment and decree, and the appellee Ida Cullen Boyd purchased the same at such sale and took a certificate of sale therefor, which the said appellee afterward sold and assigned to the appellee Jackson Boyd; after the expiration of the year for redemption, said land not having been redeemed, the appellee Jackson Boyd received from the sheriff of Putnam county a deed therefor, said land being described in the proceeding and in said deed by the lot numbers as originally in the mortgage.

Thereafter, when said appellee Jackson Boyd went to take possession of said lots, or such part of the same as he had not sold, appellants refused, upon notice and demand, to surrender possession thereof, and said appellee then filed his petition before the Honorable John H. James, special judge as aforesaid, to redocket said cause and for a writ of assistance, afterwards filing an amended petition describing said land therein by its lot numbers, and also describing it by metes and bounds, commencing at the southwest corner of lot No. 19 in trustee's plat, which point can be located by reference to the plat above. This description included the streets and alleys upon which said lots abutted, and which are involved in this action.

The petition prays for a writ of assistance, directing the sheriff to remove the appellants from said real estate and put the appellee in possession thereof.

Appellants appeared specially and objected to the Honorable John H. James sitting or acting as the

judge in said cause, he being the special judge sitting at the foreclosure proceeding in said cause. This objection was overruled by the court, to which ruling appellants excepted.

Appellants filed a demurrer to the amended petition, which was overruled, to which ruling the appellants excepted. Appellants filed an answer in three paragraphs to the amended petition, the first paragraph being a general denial. Appellee, petitioner (hereinafter called petitioner), filed his demurrer to the second paragraph of answer, which was sustained by the court to which ruling appellants excepted.

Petitioner filed his motion to strike out appellants' third paragraph of answer and cross-complaint, which motion was sustained by the court, to which ruling the appellants excepted.

The petition was submitted to the court for hearing, and evidence was heard for the purpose of identifying the said lots as the same real estate that was described by metes and bounds in said petition. To this evidence appellants objected, and excepted to the court's ruling in admitting it. There was a judgment that the petitioner was entitled to immediate possession of said real estate, describing the same both by lot numbers and by metes and bounds, and that the appellants be ejected and dispossessed, and that a writ of assistance be issued by the clerk of the court to the sheriff, directing him to eject and dispossess appellants from said real estate and to place the petitioner in the immediate possession thereof. After motion for a new trial, which was overruled, this appeal is prosecuted.

Appellants have assigned fourteen errors upon

which they rely for reversal, one of which is overruling their motion for a new trial, in which motion

1. ten errors are specified. Of these alleged errors we need only to discuss such as are contained under appellants' points and authorities, as all others are waived. These in their order:

Appellants contend that said petition is not sufficient to withstand their demurrer, for the reason that it fails to set out the sheriff's deed to appellee,

2. or a copy of the notice to appellants that application for the writ of assistance is being made. But this is not an action based upon said deed or notice, or any other written instrument. This is a summary proceeding for a writ of assistance to obtain the possession of real estate wrongfully withheld from petitioner by appellants, after their title thereto has been divested in a foreclosure proceeding, this proceeding being supplemental to and a part of the foreclosure proceeding, and to give full effect thereto. *Emerick v. Miller* (1902), 159 Ind. 317, 64 N. E. 28.

Under appellants' second point, they complain that the court erred in overruling appellant's motion to quash the notice and demand, and, under their

3-4. third point, they complain of error of the court in overruling their motion to require the petitioner to make his petition more specific by setting out a copy of the decree of foreclosure, a copy of the assignment of the certificate of purchase showing the description of the real estate therein, and the deed from the sheriff or copy thereof. By these motions appellants undertake to show that the description of the land in the petition for a writ of assistance is not the same as in the papers and record of the original

proceeding. But the petition gives the description of the land both by metes and bounds and by lot numbers, identifying the two descriptions as of the same land, and, though appellants fail to discuss their motion for a new trial, we may add that the evidence which was properly admitted fully identifies the two descriptions as of the same land. Under these points appellants challenge petitioner's right to the possession of the parts of the vacated street and alleys upon which said lots abutted before said addition was vacated, appellants claiming still to own such vacated streets and alleys, and contending that a writ of assistance can only issue when the right to possession is clear, and that in such a summary proceeding there can be no trial of any *bona fide* question as to the right of possession. But in this case there is no *bona fide* question as to the right of possession. It is the settled law of this state that a conveyance of a lot in a town or city designated by its number or other proper description, and abutting on a street or alley, carries with it the fee to the center of the street. *Cox v. Louisville, etc., R. Co.* (1874), 48 Ind. 178; *City of Logansport v. Shirk* (1883), 88 Ind. 563, 569; *Terre Haute, etc., R. Co. v. Rodel* (1883), 89 Ind. 128, 132, 46 Am. Rep. 164; *Bergan v. Co-operative Ice, etc., Co.* (1908), 41 Ind. App. 647, 84 N. E. 833; *Western Union Tel. Co. v. Krueger* (1905), 36 Ind. App. 348, 74 N. E. 25; *Irvin v. Crammond* (1915), 58 Ind. App. 540, 108 N. E. 539.

Of course, the same rule applies to a mortgage and to a deed by the sheriff to a purchaser at the sale upon foreclosure of such mortgage. This con-

5. conclusion makes it unnecessary for us to discuss appellants' fifth and seventh points, as they

each involve the same principles of law as control in disposing of appellants' second and third points.

Under their fourth point, appellants complain that the court erred in assuming jurisdiction of said petition, over the objection of the appellants, for

6. the reason that the powers of a special judge cease after final judgment has been rendered.

But the case of *Emerick v. Miller, supra*, which appellants have cited more than once in their brief, and which is a well-considered case, and which gives no comfort to appellants on any proposition involved in this case, is a strong authority against them on this point. The case was one in which a special judge was acting and, on its appeal, the Supreme Court asked: "Can there be any reason why the same court, in the same case, should not effectuate its decree by requiring the debtor to surrender that which the court had adjudged he should surrender?" and then, after discussion, answers the question by quoting the rule announced by Chancellor Kent, "that the power to apply the remedy is coextensive with the jurisdiction over the subject-matter," then saying that the rule is unassailable in reason. Putting the purchaser in possession is only an incident in the full enforcement of the court's decree. *Gilliland v. Milligan* (1896), 144 Ind. 154, 42 N. E. 1010.

Under their sixth point, appellant's complain of error in sustaining petitioner's motion to strike out appellant's cross-complaint. By this cross-

7. complaint appellants sought to quiet the title to the real estate involved. This is a summary proceeding, and, had the court permitted the appellants to contest the title by their cross-complaint, he would have permitted a departure from the theory

upon which the application rested. The court properly struck the cross-complaint out on motion. *Roach v. Clark* (1897), 150 Ind. 93, 48 N. E. 796, 65 Am. St. 353.

We have examined all the questions presented, and find no error in the proceeding.

The judgment is affirmed.

ON PETITION FOR REHEARING.

NICHOLS, C. J.—Some of the streets vacated were upon the margin of appellant's land as then owned by him and were made therefrom, and appellants contend that appellees should be restricted from going into possession of the lands embracing such streets so vacated beyond the center thereof. In the original opinion, it was held that when streets are vacated the fee thereof to the center of the street continues in the owner of the abutting land; in other words, it goes back to the grantee, immediate or remote, of the owner who dedicated it to public use. By the same principle, where the street or highway has been wholly made from, *and upon the margin of*, the grantor's land, the subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole of the street so dedicated. This principle is so decided in the case of *Irvin v. Crammond* (1915), 58 Ind. App. 540, 108 N. E. 539, which is the case last cited in the original opinion. See, also, *Johnson v. Grenell* (1907), 188 N. Y. 407, 81 N. E. 161, 13 L. R. A. (N. S.) 551; *Haberman v. Baker* (1891), 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611.

The petition for rehearing is overruled.

MODERN WOODMEN OF AMERICA v. STONE.

[No. 10,051. Filed December 16, 1919.]

1. **INSURANCE.**—*Life Insurance.*—*Action on Policy.*—*Instructions.*—*Right of Forfeiture.*—*Waiver.*—Where a fraternal society's by-laws provided for a forfeiture of a policy if a member should become intemperate in the use of intoxicating liquors, or if his death should result directly or indirectly from his use thereof, an instruction, in an action on an insurance contract issued by such society that, if insured died from the intemperate use of intoxicating liquors, and if defendant, knowing of such use, continued to accept the assessments stipulated in the policy, defendant was liable, was erroneous, since the acceptance of such assessments with knowledge of insured's use of intoxicating liquors did not constitute a waiver of the right to defend on the ground that insured's death resulted from the intemperate use of intoxicants. p. 603.
2. **APPEAL.**—*Presenting Questions for Review.*—*Instructions.*—*Setting Out in Brief.*—It is not necessary that the brief of appellant should contain all of the instructions given in order to have the action of the court in giving and refusing certain instructions considered. p. 606.

From Davies Circuit Court; *William R. Gardiner*, Special Judge.

Action by Martha A. Stone against the Modern Woodmen of America. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Truman Plantz and *Cullop, Downey & LaPlante*, for appellant.

Harry R. Lewis and *Alvin Padgett*, for appellee.

BATMAN, J.—This is a second appeal in this cause. On the trial subsequent to the decision on the former appeal, the pleadings theretofore filed remained unchanged, but appellant filed two additional paragraphs of answer, numbered 5 and 6. Appellee filed

a reply to these paragraphs in general denial, and also filed a second paragraph of reply addressed to the first, second, fifth and sixth paragraphs of answer. The issues on the original trial are sufficiently shown in the opinion of the court on the former appeal, and no good purpose would be served by restating them here. *Modern Woodmen, etc. v. Young* (1915), 59 Ind. App. 1, 108 N. E. 869. The fifth paragraph of answer, briefly stated, alleges in substance, among other things, that the contract in suit provides that if said Young shall become intemperate in the use of alcoholic drinks, the benefit certificate shall be null and void, and all moneys which have been paid thereon shall be thereby forfeited; that on or about August 1, 1910, said Young became intemperate in the use of intoxicating liquors, and the benefit certificate became and was null and void; that prior to the time of the commencement of this action, and as soon as it learned of the intemperate use of intoxicating liquors by Young, appellant elected to declare the benefit certificate void by reason of said intemperance; and that said Young did not make any payment for dues and assessment on account of the benefit certificate subsequently to August 1, 1910, or subsequently to the time of said forfeiture.

The sixth paragraph of answer, briefly stated, alleges in substance, among other things, that the contract in suit is an Illinois contract; that it provides that the said benefit certificate should be null and void if said Young became intemperate; that, under the laws of the State of Illinois, the contract was valid and binding on the appellant and said G. W. Young; that there is no provision in the statutes of the State of Illinois rendering said contract illegal or

void, or limiting the provisions of the contract so as to provide that the benefit certificate shall not be void, but shall be voidable for such intemperance; that said Young became and was intemperate in the use of intoxicating liquors, and that by reason thereof the benefit certificate was null and void according to its terms. Said paragraph of answer also contains a copy of the decision of the court in the case of *Royal Templars, etc. v. Curd* (1884), 111 Ill. 284, as the basis for its charge that, under the law of the State of Illinois, the alleged intemperate use of intoxicating liquors by said Young, under the terms of the contract in suit, rendered said benefit certificate absolutely void, and not voidable only.

Appellee's said second paragraph of reply alleges in substance that, for a long time prior to the death of said Young, appellant had full knowledge of the alleged fact that said Young was intemperate in the use of intoxicating liquors, but continued to accept and retain assessments from him. On the trial subsequent to the former appeal, the cause was submitted to a jury, resulting in a verdict and judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

Appellant contends that the court erred in giving certain instructions on its own motion, among which is No. 5. This instruction reads as follows:

1. "If you should find from a preponderance of the evidence that the assured, the holder of the certificate, died from the intemperate use of intoxicating liquors; and you should so further find that the defendant knew of the intemperate use of intoxi-

cating liquors by him, but notwithstanding such knowledge, it continued to accept the assessments provided for by the terms of the certificate until his death, then you should find for the plaintiff on that issue." By reference to the by-laws of appellant, which form a part of the contract in suit, we observe that they contain the following provisions concerning the use of intoxicating liquors:

"If any member of this society * * * shall become intemperate in the use of intoxicating liquors * * * or if his death shall result directly or indirectly from his use of intoxicating liquors * * * then the certificate held by said member shall by such acts become and be absolutely null and void, and all payments made thereon shall be thereby forfeited."

It will be noted that the part of the contract above quoted contains two conditions which would constitute a defense to an action on the contract, viz.: (1) The intemperate use of intoxicating liquors by the insured. (2) The death of the insured resulting directly or indirectly from the use thereof. These two grounds of defense are wholly separate and distinct. *Busing v. Modern Woodmen, etc.* (1909), 151 Ill. App. 49; *Curtis v. Modern Woodmen, etc.* (1915), 159 Wis. 303, 150 N. W. 417. The above instruction evidently relates to the second ground of defense stated above. It will be observed that the instruction under consideration informed the jury that such defense was not available to appellant, if it knew of the intemperate use of intoxicating liquors on the part of said Young, but notwithstanding such knowledge, it continued to accept the assessments provided by the terms of the

certificate until his death. This rendered said instruction erroneous. The learned judge who wrote the opinion on the former appeal made it clear that the acceptance of assessments, with knowledge of the existence of the first condition stated above, was not a waiver of the right to defend on the ground of the second condition when it arose. This is manifestly true, since the acceptance of assessments could only be taken as evidence of a waiver of a prior breach of some condition of the contract. The condition to which the instruction under consideration refers arose only at the insured's death, and hence the acceptance of assessments prior thereto would not be a waiver thereof as the instruction in effect states. There was some evidence introduced on the trial which tends to show that the insured had been intemperate in the use of intoxicating liquors for several months prior to his death, of which fact appellant had knowledge; that with such knowledge appellant continued to accept assessments from the insured until his death; that, while in a drunken state from the use of intoxicating liquors, he engaged in an altercation with one Cardinal, which terminated in the death of the insured; and that the use of such liquors in producing his drunken state was the proximate cause of his death. We do not presume to pass upon the weight of this evidence, but merely call attention to it to show the possible harm that may have resulted to appellant by reason of the error in said instruction. Under these circumstances we are forced to hold that its giving was reversible error.

Appellant contends that this appeal should not be considered on its merits because of a failure to com-

ply with the rules governing the preparation
2. of transcripts. She asserts in support of this contention that the transcript is not neatly and securely bound; that the pages are not properly numbered; that it does not have a proper index, and does not contain a copy of the appeal bond. The first objection to the transcript is not well taken. The second and third objections have been met by corrections made in pursuance of leave granted by this court. The fourth objection has been removed by the clerk of the trial court filing a copy of said appeal bond in this court in compliance with a writ of *certiorari* granted since the filing of appellee's brief.

Appellee further contends that, if this appeal is entertained, any error relating to the giving or refusing to give instructions should not be considered, for the reason that they are only set out in that part of appellant's brief devoted to argument, and it does not appear "that all the instructions are contained in the brief or bill of exceptions."

Appellee is in error as to where the instructions appear in appellant's brief. It is not necessary that the brief of an appellant should contain all the instructions given in order to have the action of the court in giving and refusing to give certain instructions considered. *Simplex, etc., Appliance Co. v. Western, etc., Belting Co.* (1909), 173 Ind. 1, 88 N. E. 682; *Waters v. Indianapolis Traction, etc., Co.* (1916), 185 Ind. 526, 113 N. E. 289; *Indianapolis, etc., Traction Co. v. Senour* (1919), *ante* 10, 122 N. E. 772. The only bill of exceptions appearing in the record is the one containing the evidence, and it is not necessary that anything with reference to the instructions be shown therein.

Murray v. Sumner—71 Ind. App. 607.

For the reason stated, the judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings consistent with this opinion.

MURRAY ET AL. v. SUMNER ET AL.

[No. 10,178. Filed December 16, 1919.]

FRAUDULENT CONVEYANCES.—*Husband and Wife.—Burden of Proof.*

—Where a husband, shortly after wrongfully killing a man, made a deed to his wife, leaving no property with which to pay his general creditors, or any claim growing out of such killing, the burden of proof, in an action to set aside such deed, rests upon the grantee to show an actual indebtedness owing by grantor to her.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Eva Sumner and others against John N. Murray and others. From a judgment for the plaintiffs, the defendants appeal. *Affirmed.*

H. W. Carpenter, for appellants.

Frank Ely and *John L. Sumner*, for appellees.

ENLOE, J.—This was an action by appellees and against the appellants to set aside, as being fraudulent, a conveyance of certain real estate.

The complaint, which was in two paragraphs, was answered by appellant John N. Murray, first in general denial; second, denying any fraudulent intent and alleging that said conveyance was made upon a valuable consideration, and in fulfillment of certain promises theretofore made. The appellant Favillie

Murray filed answer in four paragraphs, to the third of which a demurrer was sustained. The first paragraph of her answer was in general denial, and the second and fourth each denied any fraud, or knowledge of fraudulent intent, and alleged that the conveyance was made to her upon a valuable consideration, etc. Reply by appellees to these affirmative paragraphs of answer closed the issues. The cause was submitted to the court for trial, which made a general finding in favor of appellees, and entered a decree cancelling said deed.

The only error assigned is the action of the court in overruling motion for new trial. The reasons for a new trial, as set forth in said motion, require us, in the determination of this case, only to consider whether the decision of the court is sustained by sufficient evidence.

It appears from the record in this case that on June 26, 1916, the appellant John N. Murray was the owner of certain lands in Pike county, Indiana; that on said date said John N. Murray shot and killed one Carl Sumner, at and in said county; that thereafter he immediately fled to another county and, while in said county and before his arrest, he did, on June 29, 1916, execute and attempt to convey to his wife, Favillie Murray, his coappellant herein, all of his lands; that thereafter said John N. Murray was convicted of the crime of murder in said killing, and sentenced to be confined in the state prison for life; that, after he had thus made this conveyance, he had no property left with which to pay creditors; that the appellees are, respectively, widow and son of said Carl Sumner, so killed by appellant, and that shortly after said killing appellee Eva Sumner, as the admin-

istratrix of the estate of Carl Sumner, brought suit for the damages sustained by herself and child by reason of such killing of her said husband, in which suit she obtained a judgment against appellant John N. Murray for the sum of \$2,000; that execution had been issued thereon, returned "no property found." This suit was then brought to set aside said deed, so that said lands might be subjected to sale to satisfy said judgment.

The appellants sought to avoid the setting aside of said deed, by asserting that said lands were conveyed by said John N. Murray to his wife, Favillie Murray, in payment of a pre-existing indebtedness owed by said Murray to his said wife.

The appellant John N. Murray, in his testimony, told of the execution of the deed, and of his alleged indebtedness to his wife. The wife was not present when the deed was made, and knew nothing of its having been made until some time afterwards. Appellant John N. Murray was the only witness testifying directly to the facts of the alleged indebtedness, and he attempted to relate in his evidence the circumstances thereof in detail.

It is not contended by counsel for the appellants that the appellees did not, in the presentation of their case in chief, make out a *prima facie* case, but, if we get the force of their argument, their contention is that, "as fraud is never presumed, but must be clearly proven," the burden of proving the fraud rested upon the appellees at all stages of the trial.

In *Burt v. Timmons* (1887), 29 W. Va. 441, 2 S. E. 780, 6 Am. St. 664, it was said: "A fraud upon creditors consists in the intention to prevent them from recovering their just debts by an act, which with-

draws the property of the debtor from their reach.

* * * It is often said, that fraud must be proved and is never to be presumed. This is true, only when understood as affirming, that a contract or conduct apparently honest and lawful must be treated as such, until it is shown to be otherwise by evidence either positive or circumstantial; but fraud may be inferred from facts calculated to establish it; and fraud should be so inferred, when the facts and circumstances are such as to lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors with the intent to prevent them from recovering their just debts; and, if *prima facie* such fraudulent attempt is thus established, it may be regarded as conclusively established, unless it is rebutted by facts and circumstances, which are proven. * * * Transactions between father and child, brother and sister, husband and wife, or between others, between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction is impeached as fraudulent, may be shown to be fraudulent by less proof, and the party claiming the benefit of such a transaction is held to a fuller and stricter proof of its justice and fairness, after it has been shown to be *prima facie* fraudulent, than would be required, if the transaction was between strangers. * * * A transfer of property either directly or indirectly by an insolvent husband to his wife is justly regarded with suspicion; and unless it clearly appear to have been entirely free from wrong intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained."

In *Bump on Fraudulent Conveyances*, §66, it is said: "The grantee need not prove the payment of the consideration until the fraudulent intent of the grantor is shown, but when that is shown, it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power * * *. The facility with which a fictitious payment may be fabricated renders it necessary for him to produce all the proof which may reasonably be supposed to be in his power of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud."

In the case of *Bank of Colfax v. Richardson* (1899), 34 Ore. 518, 54 Pac. 359, 75 Am. St. 664, it was said: "The conveyance, and the circumstances under which it was made, bear the semblance of an attempt to cover up the property, and it was therefore, the defendant's duty to show that it was made in good faith, and for a valuable consideration. * * * 'Any other rule, where property has been shifted from one member of a family to another, and creditors left unprovided for, would lead to the most flagrant frauds. The creditors could not show that the indebtedness claimed to be the consideration of the transfer did not exist. They could do no more than to inquire when and under what circumstances it was created; and, unless the recipient of the property could give a clear and precise account of the items constituting it, they should have the right to ask the court to infer that it was a sham and a pretense; otherwise property might be put beyond the reach of creditors with impunity.'"

In the case of *Flint v. Chaloupka* (1907), 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. 639, it was said: "It is a well-established rule that,

where a transfer of land is made by a debtor to a near relative in consideration of a past due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. * * * When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion."

In the case of *Morgan v. Kendrick* (1909), 91 Ark. 394, 121 S. W. 278, 134 Am. St. 78, it was said: "The circumstances thus surrounding this deed and the alleged transaction between father and sons are sufficient to arouse suspicion and to throw doubt upon them as legitimate contracts. The circumstances of this case and the relation of the parties make out a *prima facie* case of fraud which impeaches the consideration of the deed, which has not been overcome by any testimony in the case."

In cases like the one at bar, it is so well settled as to need no further citation of authority that, after the fact of the execution of the deed of conveyance to a near relative is proved, leaving no property with which to pay his general creditors, a sufficient case has been made to put the other parties to the proof of an actual indebtedness owing by grantor to grantee. The grantee has this burden. In this case we have read all the testimony given on the trial, as the same is contained in the bill of exceptions, and, after a reading of the same, it is our opinion that the

finding of the court is amply sustained by the evidence.

The judgment of the Pike Circuit Court is therefore affirmed.

FEDERAL LIFE INSURANCE COMPANY v. BARNETT,
ADMINISTRATRIX.

[No. 10,001. Filed December 17, 1919.]

1. **INSURANCE.—Reinsurance.—Action on Original Policy.—Complaint.—Necessity of Setting Out Reinsurance Contract.**—In a beneficiary's action on an original life policy against a reinsuring company to recover a personal judgment against the reinsurer, in the absence of a reinsurance policy having been issued to insured, the contract of reinsurance is the foundation of the cause of action, and must be made a part of the complaint in order to authorize a personal judgment against defendant, since its liability rests on the contract of reinsurance. pp. 627, 628.
2. **INSURANCE.—Reinsurance Contract.—Rights of Policy-holder or Beneficiary.**—A reinsurance contract between defendant and the insurer of plaintiff's intestate entered into under §4753 Burns 1914, Acts 1897 p. 318, and made for the benefit of the policy-holders of the latter company, entitles a policy-holder, or in event of his death, his beneficiary to maintain an action on such reinsurance contract. p. 628.
3. **INSURANCE.—Reinsurance.—Action against Reinsurer.—Complaint.—Allegations as to Reinsurance Contract.**—In an action by the beneficiary of a life policy against a reinsurer, in the absence of a reinsurance policy, the complaint must allege directly whether the contract of reinsurance was oral or written, and, if written, a copy thereof must be made part of the complaint. p. 629.
4. **INSURANCE.—Reinsurance.—Liability of Reinsurer.—Rights of Insured.**—Though generally the liability of the reinsurer is solely to the reinsured, it is competent for the reinsurer to make the reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions allowing a third party to maintain an action on a contract made for his benefit, he may recover directly from the reinsurer. p. 630.

5. **INSURANCE.—Life Insurance.—Action on Policy.—Complaint.—Allegations of Performance of Conditions.—Sufficiency.**—Where a life policy provided that a failure to furnish proof of the death of insured within one year thereafter should be a conclusive bar to recovery thereon, the insurer's liability did not attach *ipso facto* upon the death of the insured, but depended on the furnishing of such proof by some one on behalf of the insured or his beneficiary, and, in an action on such policy, an allegation in the complaint that insured had performed all the conditions of the policy is insufficient to show that the required proof of death had been furnished. p. 630.
6. **INSURANCE.—Life Insurance.—Contract.—Validity.**—The parties to a life insurance contract had a right to agree that "the company must be furnished at its office in the city of Indianapolis with proof of death," within a year, and that a failure to do so should be a conclusive bar to any recovery on the policy, and it was the duty of insured to have informed his beneficiary, or some other person, of the existence of the policy, and of such condition so that the proofs of death could be furnished. p. 632.
7. **INSURANCE.—Life Insurance.—Policy.—Construction.—Condition as to Proof of Death.—Necessity of Compliance.**—Contracts of insurance, when of doubtful meaning or when open to two constructions, are to be construed against the insurance company, but where the contract plainly requires that some one on behalf of insured make proof of insured's death within a stipulated time, nothing less than an act of God will excuse failure to make such proof, and unless such proof is made or waived, the right of action is forfeited where the policy so provides. p. 633.
8. **INSURANCE.—Life Insurance.—Contract.—Failure to Make Proof of Death.**—In a beneficiary's action against a reinsurer on a life policy issued by the original insurer, providing that "the company must be furnished at its office in the city of Indianapolis with proof of death," within one year, the failure of plaintiff to furnish proof of death within the time required by the policy is not sufficiently excused because the reinsurer did not maintain an office in the State of Indiana, to plaintiff's knowledge. p. 634.
9. **INSURANCE.—Life Insurance.—Contract.—Proof of Death.—Failure to Make.**—The instantaneous death of insured would not constitute an act of God, excusing failure to make proof of death within the time stipulated in an insurance policy. p. 634.
10. **PLEADING.—Departure.—What constitutes.**—A reply must support the complaint, and a violation of this rule constitutes a departure which must be attacked by a demurrer. p. 635.
11. **INSURANCE.—Life Insurance.—Action on Policy.—Reply Not Supporting Complaint.—Sufficiency.**—In an action on a policy of

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life insurance, where the complaint alleged that insured fully performed all the terms and conditions of the policy, and a paragraph of reply admitted that he did not so perform and alleged a waiver of performance, the reply was subject to demurrer on the ground of departure. p. 635.

12. **APPEAL.—Affirmance.—Correct Determination of Cause.—Erroneous Ruling on Demurrer.**—Where upon the whole record the court on appeal is satisfied that a fair trial was had and a correct result reached, the cause will not be reversed because of error in overruling a demurrer or a motion to make more specific. p. 636.
13. **INSURANCE.—Reinsurance.—Consent of Insured in Mutual Company.—Statute.**—The provision of §4753 Burns 1914, Acts 1897 p. 318, that no contract reinsuring the risks of a mutual company can be entered into unless authorized and approved by two-thirds of the policy-holders attending a meeting for that purpose, renders inapplicable, in such cases, the rule that a policy-holder is not bound by a reinsurance contract, because he is not a party to it and is without voice in its making. p. 636.
14. **APPEAL.—Briefs.—Appellant's Recital of Evidence.—Appellee's Failure to Challenge.—Effect.**—Where appellee makes no objection to appellant's recital of the evidence, the court on appeal will accept such recital as correct. p. 637.
15. **INSURANCE.—Life Insurance.—Action on Policy.—Insured's Knowledge of Reinsurance Contract.—Evidence.**—In a beneficiary's action on a life policy against a reinsurer, evidence held insufficient to show that insured, at the time he received the reinsurance policy issued to him by the reinsurer, and at all times thereafter, was ignorant of the terms of the reinsurance contract. p. 637.
16. **INSURANCE.—Reinsurance.—Action on Policy.—Failure to Pay Premiums.—Finding of Fact.—Sufficiency of Evidence.**—In a beneficiary's action on a life policy against a reinsurer, evidence held insufficient to sustain a finding that insured refused to recognize the reinsurance contract as binding and that his failure to pay premiums was because defendant demanded a premium greatly in excess of the amount charged in the original policy. p. 638.
17. **INSURANCE.—Life Insurance.—Action on Policy.—Failure to Furnish Proof of Death.—Finding of Fact.—Sufficiency of Evidence.**—In a beneficiary's action on a life policy against a reinsurer, where plaintiff had in her possession the policy sued on, the reinsurance policy, and letters to insured, which gave sufficient information to enable her to have furnished proof of death as required by the policy, there was no legal excuse for failure to furnish such proof and the action could not be maintained. p. 647.

From Cass Circuit Court *J. P. Wason*, Special Judge.

Action by Roxie E. Barnett, administratrix of the estate of George E. Barnett, deceased, against the Federal Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

C. A. Atkinson and Long, Yarlott & Souder, for appellant.

William L. Barnum, Jr., and Joseph M. Rabb, for appellee.

McMAHAN, J.—The Model Life Insurance Company, hereinafter called the Model, organized and doing business on the assessment plan under Acts 1897 p. 318, §4739 *et seq.* Burns 1914, issued a policy of insurance for \$2,500 on the life of George E. Barnett, November 7, 1901. This is an action by appellee, as administratrix of his estate, against appellant on said policy. The amended complaint, hereinafter referred to as the complaint, upon which this case was tried, after alleging the incorporation of the Model and the issuance of said policy, a copy of which was attached to and made a part of said complaint by exhibit, alleged: "That the said George E. Barnett in all things fully observed, kept, performed and fulfilled all and singular, the things which were on his part to be observed, performed and fulfilled, according to the conditions, form and effect of said policy of insurance up to and including February 16 A. D. 1908;" that on March 12, 1904, pursuant to a certain transaction between the Model and appellant, the Model transferred to appellant all of its property and outstanding insurance risks, including that upon the life of George E. Barnett and, in consideration of such transaction and transfer, appel-

lant assumed and agreed to perform each and every obligation and promise theretofore made by the Model to its members; that George E. Barnett died on February 16, 1908; that the Model ceased to exist and ceased to have or maintain any office in the city of Indianapolis from and after March 12, 1904; that proof of the death of said insured could not be furnished to the Model as was required by said policy; that appellee in February, 1910, notified appellant of the death of said insured and requested blanks and instructions as to making of proofs of loss under said policy—No. 5299—but that appellant refused to furnish the blanks, and denied that the policy was of any force or validity; that appellant was a nonresident corporation of the State of Indiana at the time of the death of the insured, and, from that time to the bringing of this action, had no office or place of business in Indiana to the knowledge of appellee; that prior to February, 1910, she had no knowledge of the location of appellant's office or place of business, and for that reason was unable to give appellant notice of the death of said insured before February, 1910; that, upon learning the address and place of business of appellant, she promptly notified it of the death of the insured.

Appellant filed a motion to make this complaint more specific by requiring appellee to state whether or not the transaction of March 12, 1904, between the Model and appellant was in writing, and to set forth whether the alleged assumption and agreement by appellant to perform the obligations of the Model was in writing, and, if in writing, to set out the terms and conditions of such assumption. This motion being overruled, appellant filed its demurrer for want

of facts. The grounds specified in the memorandum being: (1) That the complaint does not state the facts concerning the transfer to appellant; the nature, extent and character of the consideration for such transfer, assumption and agreement, but mere legal conclusions; (2) that no proof of the death of the insured was furnished within one year after the death of the insured as required by the policy sued on, and that the complaint failed to show performance by the appellee of the conditions precedent to entitle her to maintain this action.

The demurrer being overruled, appellant filed an answer in five paragraphs, the first of which was a general denial.

The second admitted that appellee was the administratrix of the estate of the insured; that appellant was a corporation organized and existing under the laws of the State of Illinois, and engaged in life insurance business; that on November 7, 1901, and continuously to March 12, 1904, the Model was a mutual life insurance company; that on November 7, 1901, George E. Barnett became a member of said Model, on which date the Model issued to him a policy of insurance for \$2,500 for an annual premium of \$90.35, and that it believed that the copy attached to the complaint was a correct copy of the policy, but it denied that the insured fulfilled the obligations on his part according to the terms of the policy. It also alleged that on March 12, 1904, the Model and appellant entered into a written contract of reinsurance under the terms of which appellant reinsured the policies of the Model then outstanding on the lives of the then living policy-holders, and that the obligations assumed by appellant as to said policies and

policy-holders were assumed subject to and in accordance with the terms of said reinsurance contract and not otherwise; that the policy sued on was one of the policies so reinsured by appellant; that, under and pursuant to the terms of said reinsurance contract, appellant issued and delivered to said Barnett its reinsurance policy dated March 12, 1904, which reinsurance policy was in March, 1904, received, accepted and retained by said Barnett, and which reinsurance policy became, and was, a part of the contract of insurance between the appellant and the insured.

After admitting that the insured, George E. Barnett, died on February 16, 1908, it alleged that the president and the secretary of the Model at the time when the policy sued on was issued continued to be such president and secretary from that time to March 12, 1904, and that no persons were elected by said Model to succeed such persons subsequently to said date; that, when said policy was issued both the president and the secretary resided in the city of Indianapolis, and continued to reside therein up to and subsequently to 1910; that they continued as president and secretary of the Model after March 12, 1904, for the purpose of service of summons and notice and for the purpose of having proofs of death furnished to said Model; that appellee never made any attempt to ascertain the whereabouts of the president and the secretary, or either of them, and never made any attempt or offer to furnish proofs of the death of said insured to said Model or to appellant for more than one year after the death of said insured; that appellant had an office in the business part of the city of Indianapolis continuously from March, 1904, to 1912.

That the policy sued on provided, among other things, as follows:

“Within one year after the death of the insured, the company must be furnished at its office in the City of Indianapolis with proof of death which shall comprise satisfactory statements establishing the validity of the claim, and said lapse of time before filing such proof shall be a conclusive bar to any recovery hereon.”

That no notice was ever given to the Model of the death of the insured, and that no notice of his death was given to appellant until more than two years after his death; that appellee by reasonable diligence could have located and ascertained the address in Indianapolis of the president and the secretary of the Model prior to the expiration of one year from the death of the insured, but that she made no attempt to do so, or to notify the Model of said death; that appellee had knowledge of the reinsurance policy issued by appellant to the insured within one year from the death of the insured, and that the said reinsurance policy showed on its face the location and post office address of appellant; that the annual premium on said policy became due and payable November 7, 1904, and that it was not paid, by reason of which said policy lapsed.

A copy of the reinsurance contract between appellant and the Model, and a copy of the reinsurance policy issued by appellant to the insured were attached to and made a part of this paragraph of answer. The third and fourth paragraphs of answer were stricken out on motion of appellee and are therefore omitted. Appellee filed a reply in two para-

graphs. The first paragraph admits that the Model and the appellant entered into the written contract as alleged in appellant's answer, and alleges that said contract was entered into by said companies without the knowledge or consent of the insured; that, when so entered into, the Model was in possession of cash, bonds and notes of the aggregate value of \$50,000, held by it for the benefit of its policyholders; that the annual premium charged by appellant of a person the age of insured for a policy like the one issued to him by the Model was greatly in excess of what he was required to pay the Model and that, by the terms of said reinsurance contract, the appellant was privileged to charge against the policy held by the insured the same annual premium charged by it against like policies issued by it, and also to charge a large sum to constitute a reserve fund, which should be deducted from any amount due the beneficiary on the death of the insured; that said insured had no knowledge of the said provisions and did not consent thereto; that the Model prior to November, 1904, delivered all of its assets to appellant, abandoned its office in the city of Indianapolis, denuded itself of all means to meet these obligations, ceased to transact business, and never thereafter maintained an office where the insured could have paid the premiums due on its policy or where proof of death could be made as provided in the policy sued on; that the insured complied with all the conditions of the policy so long as the Model continued to do business and to receive premiums and did not thereafter pay any premiums on said policy to the Model for the reason that it had abandoned its contract and made no provisions for receipt of premiums or the

payment of benefits to those entitled thereto by the terms of its policies. It is also alleged that, after the Model and appellant entered into the said reinsurance contract, the appellant claimed and asserted that its liability to the policy-holders of the Model was governed entirely by said contract, and that it had the right to charge the policy-holders of the Model premiums as provided for in said contract, and to charge and assess said policies with liens as therein provided, and demanded that the insured pay such additional premiums and consent to such additional assessments and liens, on penalty of the forfeiture of his policy; that the insured refused to comply with such demands, whereupon appellant declared said policy forfeited and denied all liability thereunder; that said insured was at all times ready, willing and able to pay the premiums and assessments due on said policy according to its terms; that appellee and the children of decedent, who were alleged to be under twenty-one years of age, were inexperienced in business matters and knew nothing about the Model and appellant or about the contract of reinsurance until about February 1, 1910; that the only provision in said contract of reinsurance regarding the notice of the death of the insured provided that such proofs should be furnished on forms in use by the appellant; that, as soon as she learned about the facts concerning said policy and contract, she wrote appellant informing it of the death of the insured and requesting blanks on which to make proof of the death of insured; that appellant thereupon denied all liability on the policy mentioned in the complaint, and thereby waived proof of death; that both the appellant and the Model waived the payment of the pre-

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miums due on said policy November 7, 1904, and subsequently thereto.

The cause was tried by the court, and at the request of the parties the facts were found specially. The facts so found are in substance as follows: 1. That the Model on and prior to November 7, 1901, was a corporation organized under the laws of Indiana for the purpose of engaging in life insurance business as a mutual company. 2. That on March 12, 1904, appellant was a corporation organized under the laws of Illinois, and was then and still is authorized to engage in life insurance in this state. 3. On November 7, 1901, said Model issued to George E. Barnett a policy for \$2,500 at an annual premium of \$90.35 payable at the office of the company or its authorized agent who might produce a receipt signed by the president and secretary of said company, said policy being numbered 1546, and being set out in full. 4. On March 12, 1904, said Model without the consent of the insured entered into a written contract with appellant whereby said Model transferred all of its assets to appellant and abandoned its office in the city of Indianapolis, and since said time has maintained no office nor transacted any business; that, by reason of said contract with the appellant, the Model deprived itself of its power and ability to carry out said contract of insurance with the insured, which facts were known to appellant. 5. For this finding the court set out a copy of the reinsurance contract between appellant and the Model. 6. At the time said reinsurance contract was entered into, the Model owned and possessed assets which it held in trust for its policyholders to the value of \$43,000, which were delivered by it to appellant under said contract.

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7. After the making of said contract, and in consideration thereof, appellant issued to said Barnett its certificate of reinsurance, which reads in part as follows:

“Incorporated Under the Laws of Illinois
Federal Life Insurance Company.
Number 5299 Amount
\$5000.

Chicago.

“This Policy of Reinsurance Is Issued To George E. Barnett of Logansport, County of Cass, State of Indiana, to be attached to Certificate or Policy No. 1546, of the Model Life Insurance Company of Indiana, and subject to all the provisions of the contract of reinsurance between said The Model Life Insurance Company and this Company, dated March 12, 1904, constitutes Policy No. 5299 of the
Federal Life Insurance Company
of Chicago, Illinois.”

Said certificate was received by appellee's intestate and retained by him up to the time of his death. This policy, except as above stated, is identical in form with the reinsurance policy copied in *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230. 8. When said Barnett received said certificate so issued by appellant, and at all times thereafter, he was ignorant of the terms of said contract entered into between the Model and appellant. 9. That said Barnett paid all premiums due from him to the Model so long as the Model continued to do business or to maintain an office in the city of Indianapolis or to

have agents who were authorized to receive and receipt for premiums as provided in the policy. 10. That the annual premium charged by appellant for a policy of the same amount and character as that held by Barnett in the Model, upon policies issued by appellant to its patrons, was greatly in excess of the premium Barnett contracted to pay the Model for the policy sued on and, by the terms of said reinsurance contract, the appellant was privileged to charge policyholders in the Model the same premium for carrying their insurance as was charged by appellant upon policies originally issued by it, and, in addition thereto, to charge against the Model policies a large sum to constitute a reserve fund upon which interest should be charged and which should be deducted from any amount due the beneficiary on the death of the insured; that said insured did not consent to said condition and had no knowledge thereof until after said contract was entered into; that appellant claimed of said insured that the extent of its liability was measured by said reinsurance contract, and claimed the right to charge his policy with the liens therein provided and demanded that said insured pay such additional premiums on the penalty of forfeiting his policy; that the insured refused to comply with said demand or recognize the reinsurance contract as binding upon him, whereupon the appellant declared said policy lapsed and forfeited; that neither the insured nor any person in his behalf thereafter paid or tendered to the appellant or to the Model any sum whatever as premiums on said policy, and that he died intestate on February 16, 1908, and left an estate of the probable value of \$5,000 with an indebtedness of about \$1,000; that he left appellee, his widow, and

three infant children not under guardianship and incapable of comprehending the nature of the contract of insurance or of the rights of the insured or his beneficiaries therein; that plaintiff had no means at the time of the death of the insured of knowing the terms of said reinsurance contract, or the legal rights of the insured and his beneficiaries, and the liability of appellant; that, within thirty days from the time she became informed of the facts of the legal liability of appellant, she gave the appellant notice in writing of the death of the insured, and her claim against appellant for the amount due on the policy issued by the Model; that said notice was received by the appellant, and that it denied all liability on said policy on the sole ground that the insured had allowed said policy to lapse by failure to pay the premiums due thereon after November 7, 1903.

The court thereupon stated its conclusions of law in favor of appellee, to each of which appellant excepted, and thereafter filed its motion for a new trial. The specifications stated in the motion being that the decision of the court is (1) not sustained by sufficient evidence, (2) is contrary to law; that the court erred (3) in admitting and (4) in excluding certain evidence.

Appellant filed a motion in arrest of judgment, which was overruled, and judgment was rendered for appellee for \$2,138.60 with interest from November 15, 1910, that being the amount of the policy less the unpaid premiums amounting to \$301.40.

The errors relied upon for reversal are: (1) The overruling of the motion to make the complaint more specific; (2) overruling demurrer to complaint; (3, 4) the sustaining of appellee's motion to strike

out and in striking out the third and fourth paragraphs of appellant's answer; (5) overruling appellant's motion to strike out parts of the first paragraph of reply; (6) overruling demurrer to first paragraph of reply; (9) in overruling appellant's motion to set aside former ruling overruling demurrer to complaint; (10) in overruling appellants' motion asking the court to find the facts and law to be in favor of appellant, and to render judgment accordingly; (11) that the court erred in each of its conclusions of law; (12) in overruling a motion for a new trial; and (13) in overruling the motion in arrest of judgment.

In considering the questions involved in this appeal as they relate to the pleadings, it is necessary that we keep in mind that this is an action to

1. recover a personal judgment against the appellant on a policy issued by the Model, and where there was a written contract of reinsurance executed by the Model and appellant, and where neither the reinsurance contract nor the reinsurance policy issued by the appellant is made a part of the complaint, as was done in *Federal Life Ins. Co. v. Petty* (1912), 177 Ind. 256, 97 N. E. 1011, and *Federal Life Ins. Co. v. Kerr*, *supra*. The first contention of appellant is that the court erred in overruling its motion to make the complaint more specific. The only attempt to connect the appellant with the policy sued on is in that part of the complaint where it is alleged that pursuant to a certain transaction between the Model and the appellant, by which the Model transferred to the appellant all of its property, assets and members and, in consideration of such transfer, the appellant assumed and agreed to perform every ob-

ligation theretofore made by the Model to its members.

The contract between the appellant and the Model was entered into under §4753 Burns 1914, Acts 1897 p. 318, and, having been made for the benefit

2. of the policyholders of the Model, such policyholder, or, in case of his death, his beneficiary may maintain an action on such reinsurance contract against appellant.

In the absence of the reinsurance policy being issued by appellant to the insured, as was alleged in the Petty and Kerr cases, *supra*, the contract of

1. reinsurance is the foundation of the cause of action and must be made a part of the complaint in order to authorize a personal judgment against the appellant. Appellants' liability rests on the contract of assumption or reinsurance. *Spande v. Western Life Indemnity Co.* (1912), 61 Ore. 220, 117 Pac. 973, 122 Pac. 38. Appellee contends that the complaint is founded on the policy of insurance issued by the Model, and not on the contract of reinsurance between appellant and the Model, and cites *Federal Life Ins. Co. v. Kerr, supra*; *Federal Life Ins. Co. v. Petty, supra*; *Federal Life Ins. Co. v. Arnold* (1910), 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; *Federal Life Ins. Co. v. Risinger* (1910), 46 Ind. App. 146, 91 N. E. 533; *Federal Life Ins. Co. v. Maxam* (1919), 70 Ind. App. 266, 117 N. E. 801, 118 N. E. 839, and *Federal Life Ins. Co. v. Weedon, Admr.* (1918), 68 Ind. App. 529, 118 N. E. 842, as being decisive upon this and other questions involved in this appeal. In each of the cases cited by appellee the reinsurance policy issued by appellant was made part of the complaint, and the court in each of those cases held that when

that was done it was not necessary to make the contract of reinsurance a part of the complaint. We are not questioning the correctness of those decisions. We simply hold that they are not applicable to the question now under consideration. *McDill v. Gunn* (1873), 43 Ind. 315; *Helms v. Kearns* (1872), 40 Ind. 124. In the absence of the reinsurance contract there can be no recovery. There must be an agreement of some kind before appellant can be held personally liable. *Bateman v. Butler* (1890), 124 Ind. 223, 24 N. E. 989; *State, ex rel. v. Kelso* (1884), 94 Ind. 587; *Rodenbarger v. Bramblett* (1881), 78 Ind. 213; *Southern, etc., Sav. Inst. v. Roberts* (1908), 42 Ind. App. 653, 86 N. E. 490.

In *Risk v. Hoffman* (1879), 69 Ind. 137, Risk purchased a tract of land and, as part of the purchase price; assumed the payment of a certain note and mortgage held by Hoffman. Hoffman sued Risk for the amount due on the mortgage. The court in the course of its opinion said: "The agreement of Risk to pay off the mortgage on the land is the foundation of this action."

In *Davis v. Hardy* (1881), 76 Ind. 272, the court said: "'No one save Edwards, who it is alleged, assumed the payment of the note, was liable. He was not liable on the note and mortgage, but on his promise to pay the debt.'" So in the instant case we must look elsewhere than to the Model policy for the liability of appellant. We must, in the absence of a reinsurance policy having been issued by appellant to George E. Barnett, look to the reinsurance contract between the Model and appellant. This was recognized by appellee in her complaint, but,

3. instead of directly alleging that the contract of reinsurance was oral or written, so worded

her complaint as to leave the presumption that the contract was oral. The appellant had the right to know whether appellee was seeking to recover on an oral or on a written contract, and, if on a written contract, to have a copy of the same made a part of the complaint.

While "as a general rule the liability of the reinsurer is solely to the reinsured, * * * it is competent * * * for the reinsurer to make the

4. reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions where a third party is allowed to maintain an action on a contract made for his benefit, he may, in such case, recover directly from the reinsurer." 24 Am. and Eng. Ency. Law (2d ed.) 258; *Ruohs v. Insurance Co.* (1903), 111 Tenn. 405, 78 S. W. 85, 102 Am. St. 790; *Spande v. Western Life Indemnity Co.*, *supra*.

It was error to overrule the motion to make the complaint more specific.

The appellant contends that the court erred in overruling its demurrer to the complaint. The first contention is that the complaint shows that

5. proof of death was not furnished within one year after the death of the insured as was required by the policy of insurance. The policy provided that a failure to furnish proof of the death of the insured to the Model at its office in the city of Indianapolis within one year after the death of the insured should be a conclusive bar to any recovery thereon. The liability of appellant to pay the amount named in the policy of insurance did not attach *ipso facto* upon the death of the insured. It depended upon the performance by some one on behalf

of the insured or his beneficiary of a condition precedent, namely to furnish proof of death within one year as provided in the policy. *Supreme Lodge, etc. v. Meister* (1897), 78 Ill. App. 649. Conditions in a life insurance policy as to the time within which proof of death must be furnished must be complied with. In the case of *Indiana Ins. Co. v. Capehart* (1886), 108 Ind. 270, 8 N. E. 285, the court, among other things, said: "Furnishing the proofs stipulated for in the policy, was a condition precedent to the plaintiff's right of recovery. The claim for loss was not due until sixty days after such proof was furnished. It was therefore essential to the sufficiency of the complaint that the plaintiff should affirmatively show a performance of the conditions upon which the claim matured, or that a performance had been waived." See, also, *Hanover Fire Ins. Co. v. Johnson* (1901), 26 Ind. App. 122, 57 N. E. 277; *Forest City Ins. Co. v. School Directors* (1879), 4 Ill. App. 145; *Home Ins. Co. v. Lindsey* (1875), 26 Ohio 348; *Harrigan v. Home Life Ins. Co.* (1900), 128 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99; *Trippe v. Provident Fund Society* (1893), 3 Misc. Rep. 445, 23 N. Y. Supp. 173; *Larkin v. Modern Woodmen, etc.* (1910), 163 Mich. 670, 127 N. W. 786; *Patton v. Employers', etc., Assur. Co.* (1887), 20 L. R. Ir. 93.

It is true, as appellee contends, that the complaint alleges specifically that the insured performed all the conditions which by the terms of the policy he was required to perform. But that falls far short of alleging proof of death, which could only be performed by appellee or some other person after the death of the insured.

Appellee also contends that the complaint states

facts that excused her from presenting proof of death as required by the policy, and cites *Federal Life Ins. Co. v. Petty, supra*, in support of this proposition. That case, however, lends appellee no assistance. The appellant in the case just cited set up by way of answer that no proof of death had been furnished the Model as required by the terms of the policy. The court, in discussing the sufficiency of the answer, said: "If it were conceded that appellant's liability was limited by the provisions of the reinsurance contract, it is clear that it was not contemplated by the terms thereof that proof of death of the insured should, after the execution of the reinsurance contract, be furnished the Model company.

* * * Under the very terms of the contract, if a duplicate copy of the proof of death had been mailed to the Model company, it would have been received and retained by appellant. The law does not require a party to do a useless act." It may be said that, inasmuch as the reinsurance contract is not made a part of the complaint in the instant case, the quotation from the Petty case is not in point. It does, however, emphasize the necessity of requiring such contract, or the terms and conditions thereof, to be stated in the complaint, and the error of the court in overruling the motion to make the complaint more specific.

The particular allegations in the complaint bearing upon the failure to furnish proof of death are: (1)

That the Model ceased to exist and ceased to

6. maintain an office in the city of Indianapolis, and proof could not be furnished it; (2) that appellant was a nonresident corporation, and at the time of the death of the insured and, from that time

to the commencement of this action, had no office or place of business in this state to appellee's knowledge, and for that reason she was unable to furnish it with proof of death prior to February, 1910. When the insured, George E. Barnett, entered into the contract of insurance with the Model, he, for himself, and on behalf of his beneficiary, his estate, agreed that within one year after his death "the company must be furnished at its office in the city of Indianapolis with proof of death," and that a failure to furnish such proof within that time should be a conclusive bar to any recovery on the policy. The parties had a right to enter into this kind of a contract, and, having done so, their rights and liabilities are measured by it. The insured, when he entered into this contract, knew that it would be impossible for him to furnish the company with proof of his own death, and knew that such proof must from necessity be furnished by another person after his death. With this knowledge it was his duty to have informed his wife, or some other person, of the existence of this policy and of this particular condition, in order that the proofs of death could be furnished, and if he failed to take this precaution and a loss to his estate results, he, and not the appellant, is to blame. The loss, if any, resulting from such neglect is his loss, or rather his estate's loss.

Contracts of insurance, when of doubtful meaning or when open to two constructions, are, as suggested by appellee, to be construed against the insur-

7. ance company, but when such contracts are not of doubtful meaning and capable of but one construction, then upon the theory that even an insurance company is to be treated and dealt with hon-

estly we will give the language in such contracts the same construction as if it were used in a contract where an insurance company was not a party. Bacon, in discussing the proof of death, says, "Nothing less than an act of God will excuse performance." 2 Bacon, Life and Acc. Ins. §578. "A failure to furnish proofs of loss within the time required by an insurance policy bars an action thereon unless waived, where the policy further provides that such failure shall work a forfeiture of such right of action. 2 Beach, Law of Ins. §1210; *Gould v. Insurance Co.* (1892), 90 Mich. 302, 51 N. W. 455. To the same effect, 4 Cooley, Laws of Ins. 3351; *Shafer v. U. S. Casualty Co.* (1916), 90 Wash. 687, 156 Pac. 861.

The only other allegation in the complaint as to why proof of death was not furnished appellant until

more than two years after the death of the

8. insured was that appellant did not maintain an office in the State of Indiana to appellee's knowledge. This was not a sufficient excuse for

9. failure to give notice. In *Patton v. Employers', etc., Assur. Co., supra*, the court, in quoting from *Gamble v. Accident Ins. Co.* (1870), 4 Ir. C. L. 204, said: "'Although a man cannot serve a notice after he has ceased to live, it is perfectly practicable for him so to arrange that what is required by the company shall be done by a survivor.'" It was there urged that the condition requiring notice was discharged by an act of God. In answering this argument, the court said: "'That objection is answered by the contract itself. If the contract was, as I conceive it was, that the required notice should be given by some one, the instantaneous death of the insured did not render it impossible to do what the

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condition required, since it could have been done by a survivor.' The averment, in the summons and complaint, that no other person having knowledge or notice of the contract, had, within the specified time, knowledge or notice of the occurrence, or could give notice thereof, only shows, * * * 'that the insured did not take the necessary means of enabling someone who was likely to survive him, if he should meet immediate death by a sudden accident, to give the necessary notice by apprizing some of his family or friends of the policy and of the strict condition contained in it. The dispensation of Providence in his instantaneous death would not have occasioned the omission to give the necessary notice, but for his own neglect in not providing for that contingency.' '' The demurrer to the complaint should have been sustained, on account of the failure to show that proof of death was furnished within the time required by the terms of the policy.

Appellant insists that the court erred in overruling its demurrer to the first paragraph of reply on the ground of departure. It is well settled that

10. the reply must support the complaint. A violation of this rule is termed a departure, and takes place when the plaintiff deserts the cause
11. of action stated in the complaint and resorts to another. A departure must be taken advantage of by a demurrer. 1 Watson, Practice and Forms §763. The cause of action alleged in the complaint is grounded on the allegations that the insured fully performed all the terms and conditions of the policy as required of him. The reply deserts that position, and admits that he did not so perform and alleges a waiver of performance. On the authority of *Mid-*

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land Steel Co. v. Citizens Nat. Bank (1901), 26 Ind. App. 71, 59 N. E. 211, and *Hanover Fire Ins. Co. v. Johnson, supra*, we hold that the first paragraph of reply was subject to demurrer on the ground of departure.

Complaint also is made of the action of the court in refusing to vacate its ruling on the demurrer, in sustaining appellee's motion to strike out the 12. third and fourth paragraphs of answer, in permitting appellee to amend the first paragraph of reply, and in overruling a motion to strike out parts of said paragraph of reply. We have considered each of these complaints, and hold that the rulings of the court relative thereto, if erroneous, were harmless, and call for no extended discussion. As to the effect of an error in overruling a demurrer to the complaint or other pleadings, and in overruling motions addressed to the pleadings, when upon the whole record it is disclosed that a correct result has been reached, see *Volker v. State, ex rel.* (1912), 177 Ind. 159, 97 N. E. 422, and *Vulcan Iron, etc., Co. v. Electro, etc., Min. Co.* (1913), 54 Ind. App. 28, 99 N. E. 429, 100 N. E. 307. If upon the whole record we were satisfied that a fair trial was had, and a correct result reached, we would not reverse this cause because of error in overruling a demurrer or a motion to make more specific.

The next question is whether the decision of the court (finding of facts) is sustained by sufficient evidence. In considering the finding of facts and 13. the evidence, it might be well for us to bear in mind that the Model Life Insurance Company was a mutual company owned and controlled by its policyholders. No contract of reinsurance under

§4753 Burns 1914, *supra*, could have been entered into between appellant and the Model until such contract was authorized and approved by two-thirds of the policyholders attending a meeting called for that purpose. The act of the Model in entering into the contract of reinsurance with appellant was therefore in a sense the act of its policyholders. It has been held in many cases that the policyholder is not bound by a contract of reinsurance, for the reason that he is not a party to it and had no voice in its making. An examination of the cases in which this rule is stated will disclose that the reinsuring companies were stock and not mutual companies. Our judgment is that the rule should not be applied with all its strictness in a case like the one now under consideration, where the contract cannot be entered into without the approval of the policyholders.

Appellant challenges the statement in the eighth finding that the insured, at the time when he received the reinsurance policy issued to him by appellant and all times thereafter, was ignorant of the terms of the reinsurance contract. Appellee makes no objection to appellant's recital of the evidence. We will therefore accept this recital as correct. There is no evidence as to whether the insured did or did not attend the meeting of the policyholders of the Model when the reinsurance contract was submitted to them for approval, or whether he ever saw, or did not see, the contract, or a copy of the same, before it was approved by the policyholders. The only evidence that throws any light upon his knowledge or want of knowledge of this contract is contained in a letter from the insured

to appellant dated November 4, 1904, in which the insured said:

“The premium on my policy 5299 is due Nov. 7th. and I am sorry to say that the money that I expected to pay it with I am disappointed in getting although I may get it inside of 30 days if that will do, if not I will have to pass it up. How much of a paid-up policy am I entitled to as I have already paid up 3 yrs. If I continue to pay what premium will I have to pay in the future? The understanding that I had from the agt. of the Model Life was that the policy would be paid for in about 8 or 10 yrs. and from that time on I should receive a dividend each year on the earnings. I gave a note for the reserve that I understood was to be returned to me at the expiration of either 3 or 5 yrs. I think although my memory on that is not clear on just the time. I should like very much to hear all regarding the matter at your earliest convenience and oblige.”

While this might be considered as some evidence that he did not know the exact amount of the premium he was required to pay at the date the letter was written, it is certainly no evidence that he did not thereafter and long before his death learn all about the terms of the contract, and in fact he might have known of its terms prior thereto and have forgotten the same, or not have had them in mind when he wrote this letter.

Appellant also insists that the tenth finding is not supported by the evidence. By this finding the court found that the insured did not consent to the
16. conditions of the contract in relation to the payment of premiums, and had no knowledge

thereof until after the contract was entered into; that appellant claimed to the insured that the extent of its liability was measured by the reinsurance contract, and that appellant demanded of the insured the payment of premiums greatly in excess of what he was required to pay under the terms of the Model policy, on penalty of forfeiture of his policy; that the insured refused to comply with such demand, or to recognize the reinsurance contract as binding upon him, and that appellant thereupon declared the policy forfeited. In the eleventh finding the court found that no premiums were "thereafter" tendered or paid to appellant on said policy, and that the insured died on February 16, 1908. There is no specific finding as to when appellant made the demand, as found by the court, other than that it was "after the making of the said contract between said companies." There are no facts found from which we can determine whether the insured, prior to said demand, paid any premiums to the appellant or not. The court found that he paid all premiums to the Model as long as the Model continued to do business or to maintain an office in the city of Indianapolis, or maintain agents, and that, after appellant made the demand, as found by the court, no further premiums were paid on account of the policy, but the date of the demand as found by the court is not given. Appellant and appellee on oral argument and in their respective briefs have assumed that it is found as a fact that the appellant made this alleged demand, and that the refusal of the insured to pay any premium to appellant was in November, 1904, as each of them state that the court found that no premium was ever paid on the policy after the one payable November 7, 1903. Adopt-

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ing this as the correct construction to be given to the special finding of facts, what is the evidence bearing upon the question of demand and refusal?

The only evidence upon this question is to be found in certain letters, the first of which is the one written by the insured to the appellant under date of November 4, 1904, hereinbefore set out. The others are three letters written by appellant to the insured, and dated November 8, November 22, and December 8, 1914, and are as follows:

“Nov. 8, 1904.

“Mr. George E. Barnett,
Logansport, Ind.

Re-Federal Policy 5299,—
Model No. 1546.

“Dear Sir: The premium on your policy falls due on November the 7th as you said. If paid any time previous to December 7, it will be entirely satisfactory. If you are unable to pay the full premium in cash at that time, please write us a few days before the end of November making a remittance of a substantial part of the premium in cash and we will let you sign notes due in 60 days and four months after covering the remainder * * * The policy in question has no paid-up value at this time, for the reason that it was issued by an assessment life insurance company which did not accumulate the proper reserves in cash. * * * For the present you may continue paying the same premium which you paid to the Model Life, but you must understand that the assessment clause in your policy is absolutely waived and eliminated by the Federal, and the maximum premium you could be

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required to pay would be \$187.50 annually; \$97.50 if paid semi-annually, and \$49.70 if paid quarterly. The difference between this premium and the premium you paid will be charged against your policy. An amount equal to that you have been paying will be charged against the note which you say you deposited. This will be done for two more years, you having paid three annual payments on your policy. This note, of course, represents a reserve which you should have paid, but in view of the fact that you have not paid it, it seems a proper charge against the policy and will be deducted from any settlement made under the policy in the future, unless you should see fit to pay it off in cash at some time."

"Nov. 22, 1904.

"Mr. George E. Barnett,
Logansport, Indiana.

"Dear Sir: I have your esteemed favor of the 21st inst. regarding your policy 5299.

"I beg to advise you that at the time you applied for insurance in the Model Life you signed a note for \$451.75, being the amount of one-half your annual premium for five years. This stands a lien against your policy bearing 5% interest. The amount you have been paying the past three years \$90.35 was the other half of the annual premium which you stipulated by your application to pay in cash. Up to this time you have lived up to the letter and spirit of your application. The records of the Model Life show your annual premium to be \$180.70; just \$6.80 less than the Federal Life premium, therefore, this

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note which you have signed for one-half the premium would be deducted from the amount of your policy should it become a claim. You are privileged, however, to pay this indebtedness in cash and continue your insurance from this date by paying the regular Federal Life premium of \$187.50 annually, or \$97.50 semi-annually or \$49.70 quarterly. Or you can continue paying the interest on this note as each premium falls due together with the half of the premium as you have been paying which amounts to \$112.94. In order to give you the exact condition, we might say the half annual premium is \$90.35 and \$112.94 is the interest on the five year note which you signed at the time application was made. From this \$112.94 there is to be deducted a credit of \$16.40; being the pro rata amount due you on account of the cash and assets transferred from the Model Life to the Federal Life at the time we took that company over. This credit will extend over a period of five years at which time it will exhaust. I trust I have made the matter clear to you, but if I have not I will gladly explain any point that you do not fully understand.

“You are now insured in an ‘old line’ legal reserve Company, one that will safely regard your interest and treat you with the utmost fairness and equity.

“Hoping this explanation is entirely satisfactory to you, I am

Respectfully,

“W. E. Brimstin, Asst. Secretary.”

Appellant's letter of December 8, 1904, in so far as material, is as follows:

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“Re Policy 5299 Model 1546.

“Dear Sir: The premium on your policy was due the 7th ult. and remains unpaid, although more than thirty days have elapsed.

“Should you prefer to pay the premium semi-annually or quarterly, let us know and we will inform you the amount of same.

“Please forward with your remittance the enclosed application for re-instatement duly executed by you.

“At maturity a life insurance policy is immediately convertible into cash. This cannot be done with any other assets as a general rule.

* * * We respectfully but earnestly urge you to remit at once the premium together with the enclosed health certificate or application for re-instatement duly executed. The application being satisfactory the remittance will be accepted the same as if it had been received when the above premium was due * * *. I hope you will give this matter your immediate attention in the interest of both yourself and your beneficiary.

“By C. A. Atkinson,

“Second Vice President.”

There is some confusion in the evidence relative to the amount of the policy issued to the insured. In the letter written by Mr. Barnett under date of November 4, 1904, he refers to his policy No. 5,299, and mentions a note which he says he gave the Model. This note is also referred to in appellant's letter of November 8, and more fully explained in the letter of November 22, in which it is stated that at the time Mr.

Barnett applied for insurance in the Model he signed a note for \$451.75, being the amount of one-half of the annual premiums for five years. A list of the policies carried by the Model company and reinsured by the appellant was attached to, and made a part of, the contract of reinsurance. The policies were described in this list merely by number and amount. One of the policies therein listed was No. 1,546 for \$5,000. Following the execution of this contract appellant, under date of March 12, 1904, issued to the insured its policy No. 5299 for \$5,000, which was to be attached to policy No. 1,546 of the Model Life Insurance Company, of Indiana, and constitute policy No. 5,299 of the appellant, a copy of which is set out in finding No. 7 of the court. This reinsurance policy was received by the insured, and after his death was found pinned to the Model policy.

It appears from all of the letters above quoted that George E. Barnett and the appellant, when writing said letters, had in mind appellant's policy No. 5,299 calling for \$5,000, and not the policy sued upon, which called for \$2,500. This is clear from the statement in Mr. Barnett's letter of November 4, in which he said:

“The premium on my policy 5299 is due November 7th, and I am sorry to say that the money. I expected to pay it with I am disappointed in getting, although I may get it inside of thirty days if that will do, if not, I will have to pass it up.”

There is no evidence in the record other than that contained in these letters relating to the note mentioned in them or in anywise explaining the difference in the amount of the Model policy No. 1,546 and

the amount of policy No. 5,299 issued by appellant. The condition of the evidence relating to this note calling for \$451.75, and the difference in the amount of the two policies, were called to the attention of counsel on the oral argument in this case. It was there stated by counsel for appellant that two policies dated November 7, 1901, each numbered 1,546, and each calling for \$2,500, was issued to the insured, George E. Barnett; that at the time said policies were issued he executed to the Model company his note for five years' premiums upon one of said policies, and that on the other policy he paid cash, while counsel for appellee stated that he knew nothing about the note or the second policy. Appellee contends on this appeal that appellant in its letter of November 22, 1904, made a demand upon the insured for the payment of \$97.15 per annum in addition to the premium which the Model required him to pay. In the letter from appellant to the insured of November 22, we find the statement that the note for \$451.75 was one-half of the annual premium for five years, and that \$90.35 was the other one-half of the annual premium which the insured had stipulated in his application to pay in cash. Relative to its premiums to be paid by the insured, this letter continued:

“You can continue paying the interest on this note as each premium falls due together with the one-half of the premium as you have been paying which amounts to \$112.94. In order to give you the exact condition we might say that the one-half annual premium is \$90.35 and the difference between the \$90.35 and \$112.94 is the interest on the five year note which you signed at the time

the application was made. From this \$112.94 there is to be deducted an aggregate of \$16.40 being the pro rata amount due you on account of the cash and assets transferred from the Model Life to the Federal at the time we took this company over."

The annual interest on \$451.75 at five per cent. is \$22.59. This, when added to the annual premium of \$90.35, makes \$112.94, which was the amount he was required to pay as stated in this letter. At the time the reinsurance contract was entered into, the Model had assets in the way of cash notes and bonds aggregating \$43,000, which under the law belonged to the policyholders and, which, according to the letter of November 22, was being prorated among the said policyholders, and Mr. Barnett was to be given a credit of \$16.40 on the amount due from him to the Federal on account of the cash premium and the annual interest on his note.

There is no claim or contention on behalf of appellee that her husband at any time paid or tendered any premium to either the Model or to the appellant subsequently to the premium due November 7, 1903. There is no evidence or finding that Mr. Barnett was able, ready and willing to perform the contract and make the payments as required by the terms of the policy. Appellee evidently believed that it was necessary as a matter of pleading to allege in her reply that he was able, ready and willing to perform, and on leave of court amended her reply by inserting an allegation to that effect. No evidence was introduced upon that subject other than what may be inferred from the letter written by Mr. Barnett to appellant under date of November 4, 1907, hereinbefore set out,

in which he stated that he was disappointed in not getting the money with which he expected to pay his premium, and if he did not get it within thirty days he would have to "pass it up." In view of these letters, and the statement of Mr. Barnett that he would have to "pass it up" if he did not get the money he was expecting, we are unable to understand how the court could find that the failure to pay the premiums was because of a demand on the part of appellant for a premium "greatly in excess" of the amount charged by the Model. We have carefully searched the record, and are unable to find any evidence to support the finding that the insured refused to recognize the reinsurance contract as binding. We hold that there is no evidence to support the finding of the court that the appellant demanded an excessive premium from the insured, and that he refused to pay the premiums because of such demand. It is clear from his letter that he was willing to pay and would have paid, if he had had the means with which to do so. The court in the tenth finding stated that the appellee had no means at the time of the death of the insured of knowing the terms of the reinsurance contract, or the legal right of the insured or his beneficiaries.

As bearing upon this finding, and also upon appellant's excuse or inability to furnish proof of death, appellee testified that she knew that her hus-

17. band took out the Model policy at the time he got it; that she made no effort between the date of his death in 1908 and February, 1910, to ascertain whether he had any insurance or not; that when he died she took his papers and put them in a desk, where they remained until 1910, when she found the

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policy among these papers. She not only had in her possession the policy sued on, but she also had the reinsurance policy for \$5,000 issued by the appellant, and the three letters to the insured, which on their face gave sufficient information to enable her to have furnished the proof of death as required by the policy. No legal excuse for failing to furnish this proof is alleged or proved.

We do not deem it necessary to set out or to discuss the conclusions of law. In view of the condition of the pleadings and evidence, we are of the opinion that justice will be best subserved by reversing the judgment and ordering a new trial, instead of directing the court to restate its conclusions of law. Judgment is therefore reversed, with directions to sustain the appellant's motion for a new trial, to sustain the demurrer to the amended complaint, and for further proceedings not inconsistent with this opinion.

UNITED STATES FIDELITY AND GUARANTY COMPANY v.
STATE OF INDIANA, EX REL. HALE.

[No. 10,170. Filed December 17, 1919.]

HIGHWAYS.—Improvement.—Contractor's Bond.—Action by Sub-Contractor.—Filing Claim.—Sections 5901a, 5901b Burns 1914, Acts 1911 p. 437, do not require a subcontractor to file his claim with the county auditor preliminary to filing suit on the contractor's bond to recover a balance due him for the improvement of a public highway.

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

U. S. Fidelity, etc., Co. v. State, ex rel.—71 Ind. App. 648.

Action by State of Indiana on the relation of Henry C. Hale against the United States Fidelity and Guaranty Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Batt & Danner, for appellant.

Arthur D. Cutler, for appellee.

ENLOE, J.—This was an action brought by the appellee, relator, upon a contractor's bond, in which he sought to recover an alleged balance due him as a subcontractor on a certain public highway improvement.

There are but two questions presented in this record necessary to be considered in the determination of this appeal. The first relates to the admission of certain evidence, over the objection of appellant, and the second involves the construction of §§5901a, 5901b Burns 1914, Acts 1911 p. 437, the appellant contending that under the provisions of these sections it was the duty of the relator to file his claim with the county auditor, as provided for in said sections, and that, not having done so, he had no right of action on said bond.

There is no merit in appellant's objection to the admitted evidence to which it objected, and the other question has been settled adversely to appellant in the cases of *Equitable Surety Co., etc. v. Ind. Fuel Supply Co.* (1919), 70 Ind. App. 75, 123 N. E. 22; and *Illinois Surety Co. v. State, ex rel.* (1919), 69 Ind. App. 450, 122 N. E. 30.

The judgment is therefore affirmed.

CATHCART ET AL. v. DALTON.

[No. 10,099. Filed December 17, 1919.]

1. **HUSBAND AND WIFE.—Conversion.—Chattel Mortgages.—Knowledge.—Burden of Proof.**—In an action by a wife for conversion of a stock of goods seized by defendants under a chattel mortgage executed by the husband without authority, where the defense was that the wife had led the defendants to believe that the property was owned by the husband, the defendants had the burden of proving their want of knowledge of the ownership or claim of ownership on the part of the wife. p. 654.
2. **CHATTEL MORTGAGES.—Sales Under Mortgages.—Action for Conversion.—Defense of Estoppel.—Question for Jury.**—In an action for conversion of goods sold under a chattel mortgage executed without authority by an agent, where the defense is estoppel by conduct in permitting the agent to so conduct the business as his own as to lead defendants to believe that he was the owner, knowledge or the want thereof, on the part of defendants, as to plaintiff's ownership of the property, is a question of fact for the jury. p. 654.
3. **CHATTEL MORTGAGES.—Sales Under Mortgages.—Strict Compliance With Terms.**—One who takes property under the terms of a chattel mortgage and sells the same, must, in a subsequent action for conversion by an alleged owner thereof, prove an advertisement of the sale by the notices, in the places and for the time prescribed by the mortgage. p. 654.
4. **SALES.—Agent to Sell at Retail.—Sales at Wholesale.**—Power to sell at retail does not authorize a sale at wholesale. p. 655.
5. **CHATTEL MORTGAGES.—Agent to Conduct Business.—Undisclosed Principal.—Mortgage by Agent.—Rights of Mortgagee.**—When an agent with power to conduct the business in his own name at retail mortgages, to a creditor for balance due on goods purchased, the entire stock of goods, the mortgagee has only the rights of a general creditor in the property, since to uphold the mortgage would be to effectuate a sale at wholesale, but the mortgagee would have, upon discovery of the fact of agency, a right of action against the owner for the amount of his debt. p. 655.
6. **CHATTEL MORTGAGES.—Husband and Wife.—Agency.—Conversion.—Instructions.**—In an action by the wife for conversion of her stock of goods, taken by the defendants under a chattel mortgage executed by the husband without authority, an instruction

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was correct that told the jury that, where the defendants relied on an estoppel of the plaintiff to claim ownership by having permitted her husband to operate the store, buy and sell goods, etc., in his own name, such an agency did not authorize a sale at wholesale or mortgage of the goods, and that the wife would not be bound by a mortgage given without her knowledge or authority nor by a sale at wholesale under the mortgage, and that if the defendants sold her property under such a mortgage, she was entitled to recover its value. p. 656.

From Orange Circuit Court; *William H. Paynter*, Judge.

Action by Margaret E. Dalton against John M. Cathcart and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

Arthur McCart, George McMahan and Elliott & Houston, for appellants.

W. H. Talbott and Mitchell & Mitchell, for appellee.

McMAHAN, J.—This is an action by appellee against appellants for damages for the alleged conversion of a stock of groceries and fixtures in a certain store in Campbellsburg, Indiana, alleged to have been the property of appellee. Appellants' answer was in two paragraphs, the first a general denial, and the second estoppel.

There was a verdict and judgment in favor of appellee. The only assignment of error relates to the action of the court in overruling appellants' motion for a new trial. The particular errors relied upon are: (1) That the verdict is not sustained by sufficient evidence; and (2) that the court erred in giving to the jury instruction No. 4 tendered by appellee.

As to the first contention, the facts as disclosed by the evidence are in substance as follows: Prior to

April 22, 1914, appellee was the owner of a house and two lots, and on said day she exchanged the same with one Jonathan P. Tarr for a stock of groceries and fixtures located at Paoli, Indiana. In this exchange the value of the stock and fixtures was \$625 greater than the value of the house and lots and, for the purpose of making up the difference in value, it was agreed that notes aggregating \$625 should be executed by appellee, and that the same should be secured by a mortgage on said stock of groceries and fixtures. Appellee's husband, George L. Dalton, conducted the negotiations leading up to this exchange, and, instead of appellee signing said notes, her husband signed his name to them and, in order to secure the same, he, in his own name, executed a mortgage on said stock and fixtures to Mr. Tarr. This stock of goods and fixtures were removed from Paoli to Campbellsburg, where appellee's husband rented a storeroom, into which said property was moved, paid the rent, taking receipts in his own name. The stock and fixtures were listed with the township assessor in his name for taxation. He purchased goods to replenish the stock when necessary, paying for the same out of the receipts of the store. The money received from the sale of goods in the store was deposited in the bank in the name of George L. Dalton and, in paying for goods purchased and used in the store, he drew his check for the amount required. While the store was being thus operated, George L. Dalton purchased cattle and hogs of John M. Cathcart, said cattle and hogs being butchered and sold at retail from the store. In March, 1915, there was a balance of \$198.40 due Cathcart on account of said purchases. Cathcart at that time asked Mr. Dalton

for a settlement, and a note for said amount payable to Hettie O. Cathcart, due one day after date, was executed by Mr. Dalton and, in order to secure the payment of said note, Mr. Dalton in his own name executed a mortgage on said stock of groceries and fixtures. Appellee never authorized the execution of said note and mortgage, and had no notice or knowledge of their execution until July 14, 1915, and after John M. Cathcart as agent of his wife had demanded and taken possession of said stock of goods and fixtures under the terms of the chattel mortgage, which provided, among other things, that, in default in the payment of the sum thereby secured when due, Mrs. Cathcart should be entitled to possession. On July 14, 1915, appellant John M. Cathcart, acting on behalf of his wife, called on Mr. Dalton at the store and demanded possession of the property described in the mortgage. On his demand he secured the key to the store building and took possession of the property. Within a few minutes thereafter, appellee entered the storeroom and notified Mr. Cathcart that the property belonged to her and forbade him taking it. She demanded that the keys and possession of the property be delivered to her. This was refused. Appellants reopened the store for three or four days and sold at retail and then advertised the store for sale and, on the day when it was to be sold, and just as it was being offered for sale, the appellee forbade the sale, and again notified the appellants that the property belonged to her. The appellants, however, proceeded with the sale, and the stock of groceries and fixtures were, on July 27, 1915, put up at auction and sold to John M. Cathcart for \$202. He immediately took possession of the same. The evidence as to the

value of the property at the time appellants took possession thereof, and at the time of the sale, varied greatly. Some witnesses placed the value at \$500, while others placed it as high as \$1,600. The mortgage contained a provision authorizing the sale of the property by the mortgagee, "after giving ten days' notice of the time, place and terms of sale with a description of the property to be sold by at least ten advertisements, in print or writing posted in public places in the vicinity where the sale is to take place."

John M. Cathcart accompanied Mr. and Mrs. Dalton to Paoli the day when the trade was made with Mr. Tarr, and George L. Dalton testified

1. that he told appellant Mr. Cathcart at that time that appellee's property was paying for the stock of goods and fixtures. This was an important item of the evidence, inasmuch as appellants in their answer had alleged that appellee by her conduct had led them to believe that the property was owned by George L. Dalton, and that they had no knowledge or means of knowing of any claim of ownership by appellee. The burden was on the appellants to prove want of knowledge of ownership or claim of ownership on the part of appellee. Mr. Cathcart did not directly deny this statement of Mr. Dalton, although he inferentially did so by testifying that he had no notice or knowledge that appellee claimed the property until July 27, 1915, when the property was being sold under the mortgage.

Appellants, by the fifth instruction tendered by them and given by the court, recognized the fact that it was necessary for them to prove want of

- 2-3. knowledge of ownership by appellee. By this instruction the court told the jury that, if they

found from the evidence that appellants extended credit to George L. Dalton and took the note and mortgage in the honest belief that he, George L. Dalton, was the owner of the stock of goods and fixtures, and that said belief was brought about by the acts and conduct of appellee in allowing her husband to manage and conduct the store as disclosed by the evidence, the verdict should be for the defendants. Knowledge or want of knowledge on the part of appellants of appellee's ownership of the property was a question of fact for the jury. It was also incumbent on appellants to prove that they advertised the property for sale by posting a written or printed notice in ten public places at least ten days before the date of sale. This they failed to do. The only reference to this subject is in the testimony of John M. Cathcart, where he said, "I advertised the property for sale." The manner in which it was advertised for sale is not disclosed. It does not appear that any written or printed notices of the sale were posted as was provided in the mortgage.

Appellants make no claim or contention that the appellee was not in fact the owner of the stock and fixtures. Their contention is that, under the 4-5. evidence, she is estopped to claim ownership, and for that reason the verdict is not sustained by sufficient evidence. If the appellee was the owner, and her husband was in possession as her agent, with power to conduct the business and contract debts, but without power to mortgage, then the rights of appellants were only such as a general creditor has in the property of his debtor. Power to sell at retail does not authorize a sale at wholesale. If appellant's mortgage be upheld, it results in a sale

at wholesale. Appellants contend that the appellee estopped herself by her conduct in permitting her husband to take and remain in possession of the stock of goods and fixtures, buying and selling and conducting the business in his own name; that the fact that he was in possession, conducting said business in his own name and exercising the powers of ostensible ownership, induced the appellants to believe that he was the owner thereof, and that they gave him credit and sold goods to him upon the belief that he was the owner thereof. It will be observed that this contention is not based upon the conduct of appellee at the time of the execution of the mortgage, but upon her conduct prior to that time. The rights of appellants in the property in controversy, if any they had prior to the execution of the mortgage, were only such rights as they acquired by reason of being creditors of the appellee or of George L. Dalton. There is no allegation in the answer, nor is there any evidence that Mrs. Dalton was insolvent. If the appellee was the owner of the stock of goods and fixtures, she was, insofar as the appellants are concerned, an undisclosed principal, and, when appellants discovered that fact, they had a right to prosecute an action against her as such. *Kiefer v. Klin-sick* (1896), 144 Ind. 46, 42 N. E. 447.

Appellants contend that the court erred in giving instruction No. 4, requested by appellee, and which reads as follows: "The defendants in this

6. case rely upon an estoppel of this plaintiff to claim the ownership of the goods in question by reason of her permitting her husband to conduct the store, to buy and sell goods in his own name and to deposit the money in his own name and in general

to carry on a retail store in his own name. You are further instructed that such an agency to sell at retail does not permit him to mortgage the goods and sell at wholesale, and that she would not be bound by a mortgage given without her knowledge or authority and that a sale at wholesale under the mortgage does not bind her, and if the defendants sold her property under such a mortgage she is entitled to recover the value of the goods so sold." Appellants say that this instruction is not only incorrect, but that it is in conflict with instruction No. 4 tendered by appellants and given by the court. Appellants insist that instruction No. 4, given at their request, is a correct statement of the law, and a quotation from *Preston v. Witherspoon* (1887), 109 Ind. 457; 9 N. E. 585, 58 Am. Rep. 417, and *Cowdrey v. Vandenburg* (1879), 101 U. S. 572, 25 L. Ed. 923. In this appellants are in error.

It is neither a correct quotation nor a correct statement of the law. It omits a very necessary part of the statement as contained in the cases cited, and should have been modified before it was given. The only confusion in the instructions arises because of the giving of the fourth instruction tendered by appellants. There was no error in giving instruction No. 4 tendered by appellee. The verdict of the jury is sustained by the evidence. The motion for a new trial was correctly overruled.

Judgment affirmed.

MANWEILER ET AL. v. TRUMAN.

[No. 10,008. Filed December 17, 1919.]

1. **APPEAL.—Right of Review.—Objections in Court Below.—Coappellee's Motion for New Trial.**—Where three defendants appealed, one of them who filed no motion for new trial is in no position to complain of the ruling on the motion made by the other two defendants and, no other error being assigned, the judgment must for that reason be affirmed as to him. p. 659.
2. **APPEAL.—Joint Assignment of Error.—Effect Under Statute.**—Under §4, Acts 1917 p. 523, §691d Burns' Supp. 1918, an assignment of error joint as to three appellants, will be treated as separate as to each. p. 660.
3. **APPEAL.—Evidence.—Fraud.—Review.**—Whether certain false representations were known to be such by their makers, and whether they acted in good or bad faith in making them, being questions of fact for the jury in an action founded thereon, the verdict must stand if there be any evidence to support it, and the Appellate Court will not weigh the evidence in view of the superior opportunities for observation enjoyed by the trial court and jury. p. 660.
4. **TRIAL.—Evidence.—Exclusion of Immaterial Uncontradicted Testimony.**—Where all three defendants had testified uncontradictedly to an immaterial circumstance, it was not improper to refuse to allow another witness for defendants to testify again to such circumstance. p. 661.
5. **APPEAL.—Bond.—Liability.—Affirmance as to Coappellant.**—In a term-time appeal by three defendants, where the judgment must be affirmed against one, there is a liability on the appeal bond therefor, even though there were reversible error as to the other two defendants. p. 662.

From Allen Circuit Court; *J. W. Eggeman*, Judge.

Action by Alice Truman against Frank Manweiler and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Lee J. Hartzell and *Levi A. Todd*, for appellants.
T. E. Ellison, for appellee.

McMAHAN, J.—The appellee commenced this action against Frank Manweiler, Martin Jones and Mark W. Jones, and in her complaint alleged that said parties came to her home and represented to her that said Frank Manweiler was sick with lung fever; that they had no place where he could be taken care of, and requested her to take him into her house and care for him until he was well enough to be moved; that he was so sick that he could not be taken to a hospital; that said Frank Manweiler was not ill with a contagious disease; that she told them that she could not take him or care for him if he was sick with a contagious disease; that she relied upon appellants' statement that he was not sick with a contagious disease, and took him into her house; and that a short time thereafter she learned that he was so ill with diphtheria that he could not be moved; and that in order to save his life she nursed and cared for him. It is also alleged that when appellants made said representations to appellee they knew of said Frank Manweiler's true condition, and by reason of their said false statements caused her to take him into her house and home. The cause was tried by a jury, and resulted in a verdict and judgment against all three appellants for \$100. The appellants Frank Man-

1. weiler and Mark W. Jones filed a joint motion for a new trial, which was overruled. All three appellants appeal and jointly assign as error the action of the court in overruling the motion for a new trial. Martin Jones, having filed no motion for a new trial, is in no position to complain of the action of the court in overruling the motion of the other two appellants and, as to him, the judgment must for that reason be affirmed.

Appellee contends that, the assignment of error being joint as to all three appellants, and no motion for a new trial having been filed by Martin

2. Jones, the judgment must be affirmed as to all, and cites *Coffin v. Pfau* (1916), 61 Ind. App. 384, 112 N. E. 21; 117 N. E. 869, in support of this contention. The case cited supports this contention, but appellee has overlooked §4, Acts 1917 p. 523, §691a *et seq.* Burns' Supp. 1918, which provides: "That all assignments of error on appeal whether joint or several shall be taken and construed as the joint and several assignment of each party joining therein." This statute requires us to treat the assignment of errors as a separate assignment by each appellant.

Appellants contend that there is no evidence of intent or design on their part to perpetrate a fraud upon appellee; that whatever statements were

3. made by them to appellee were made in good faith and based upon the statement of a reputable physician. The question whether the appellants falsely represented to appellee that Frank Manweiler was sick with lung fever when they knew he was suffering with diphtheria, or whether they acted in good faith with appellee, was a question of fact for the jury, and, if there is any evidence to support their verdict, it must stand. The jury in connection with their general verdict at the request of appellants answered certain interrogatories. By these answers the jury found specifically that appellants, at the time they took Frank Manweiler to the home of appellee, knew he was suffering with a contagious disease, and that they then knowingly perpetrated a fraud upon her.

While it may be said that the evidence is not very

satisfactory on the question whether appellants acted in good faith or not, there was some evidence of bad faith on their part. The jury saw and heard the witnesses while testifying. They were in position to observe their looks, their manner and conduct, their intelligence or ignorance, their powers of perceiving facts, and their capacity for remembering and stating them. They were thus enabled to know whether the witnesses testified willingly or reluctantly, and, in a word, it may be said that the jury had virtually all of the means by which they could test the credibility which should be accorded to any or all of the witnesses who testified. On appeal, however, we are deprived of all the above-mentioned tests or means to guide us in ascertaining the credibility of the witnesses or in determining the weight to be given to their testimony. We have nothing but the inanimate record of the evidence before us in which the words of one witness may mean the same as the words of another. In view of the disadvantage under which we are placed, we must decline to weigh the evidence, if there is any to support the verdict of the jury. The trial judge, in overruling the motion for a new trial, in a sense approved their verdict. We cannot set our judgment of the weight of the evidence and credibility of the witnesses against that of the jury and the trial judge, and say there is reversible error on the ground that the verdict is not sustained by sufficient evidence.

Appellants also contend that the court erred in refusing to permit them to prove by Ethel Bunker, who was the cook at the Jones camp, that

4. Frank Manweiler was at the camp on the Saturday evening before he was taken sick. There

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was no error in sustaining an objection to this testimony. All three of the appellants had testified to that fact and no witnesses had testified to the contrary. The question whether he was at the camp Saturday evening was immaterial and not relevant to any of the issues. It did not tend to dispute or impeach any evidence given on behalf of appellee. There being no reversible error, the judgment must be affirmed

This is a term-time appeal in which the appeal bond is signed by the appellant Frank Manweiler and his mother Mary Manweiler. In view of the fact

5. that the judgment must be affirmed as to the appellant Martin Jones, it would seem that appellant Frank Manweiler and his mother are liable on their bond for the payment of the judgment against Martin Jones, even though there was reversible error as to the other two appellants.

Judgment affirmed.

WIRTZ ET AL. v. BIRD.

[No. 10,112. Filed December 17, 1919.]

APPEAL.—Evidence Conflicting.—Review.—Where all questions involved in an appeal require a review of conflicting evidence, the judgment of the trial court is conclusive.

From Vanderburgh Superior Court; *F. M. Hostetter*, Judge.

Action between Christian Wirtz and another and David P. Bird. From the judgment rendered, the former appeal. *Affirmed.*

Coonse v. Bechold, Admx.—71 Ind. App. 663.

F. S. La Monte and William D. Hardy, for appellants.

Walker & Walker, for appellee.

REMY, P. J.—All questions involved in this appeal require for their determination a review of conflicting evidence. Under such circumstances the judgment of the trial court is conclusive, and on the authority of *Nicholson v. Smith* (1916), 60 Ind. App. 385, 110 N. E. 1007, judgment is affirmed.

COONSE v. BECHOLD, ADMINISTRATRIX.

[No. 10,136. Filed December 18, 1919.]

1. NEGLIGENCE.—*Automobiles.—Liability of One Not Present.*—There can be no recovery for negligent operation of an automobile against one not present, and having nothing to do with the operation of the automobile, except on the theory that the operator was his servant. p. 664.
2. MASTER AND SERVANT.—*Relationship.—Evidence.*—Where the only evidence of relationship between defendants is that one had sold the other an automobile, retaining title and the right to retake possession until the price was fully paid, there is not a particle of evidence to show that the buyer was the servant of the seller in the operation of the machine in a separate taxi business of his own, over which the seller had no control. p. 665.

From Marion Superior Court (103,303); *Theophilus J. Moll*, Judge.

Action by Lillian E. Bechold, administratrix of the estate of Fred Bechold, deceased, against Harvey Coonse and others. From a judgment for plaintiff, the named defendant appeals. *Reversed.*

Clarke & Clarke, for appellant.

William E. Reiley and Paul G. Davis, for appellee.

McMAHAN, J.—This action was commenced by appellee against Harvey Coonse, Scott Frazier and Isaac Pinkus for the death of her decedent, which she alleges was caused by the negligence of said defendants in the operation of an automobile. The cause was tried by a jury and resulted in a verdict in favor of appellee against the defendants Coonse and Frazier and in favor of the defendant Pinkus. The jury in connection with the general verdict answered certain interrogatories. Judgment having been rendered in favor of appellee on the general verdict, the defendant Coonse has appealed.

The first contention of appellant is that the court erred in overruling his motion for judgment on the interrogatories and answers. He contends that

1. under the complaint there can be no recovery against him except upon the theory that Frazier, who was operating the automobile, was his servant in its operation at the time of the accident, and that the court erred in overruling his motion for judgment on the answers to the interrogatories, for the reason that they show that he was not present at the time, had nothing to do with the operation of the automobile, and that Frazier was not his servant.

We agree with appellant in the statement that there can be no recovery against him except on the theory that Frazier was his servant in the operation of the automobile at the time of the accident, but we cannot agree with him in the statement that answers to the interrogatories disclose that Frazier was not his servant. But, in view of the fact that the cause must be

reversed for other reasons, we do not deem it necessary to enter into a discussion of the interrogatories and the answers thereto.

Appellant also contends that the court erred in overruling his motion for a new trial for the reason that the verdict is not sustained by sufficient

2. evidence. The evidence shows without conflict that the decedent was killed on October 20, 1915, by being struck by an automobile driven by Scott Frazier. On and prior to July 31, 1915, the appellant was the owner of the automobile driven by Frazier at the time of the accident, and on said date he sold the same to Frazier. Frazier gave the appellant his note for \$500, the purchase price, and assumed and agreed to pay a garage and repair bill amounting to about \$90. Frazier borrowed a sufficient amount of money from the defendant Pinkus to pay the garage and repair bill. There was a contract between appellant and Frazier in which it was provided that the title to the automobile so sold should remain in the appellant until it was paid for, and that the note was to be paid in installments of \$50 per month. Frazier purchased said car for the purpose of operating it as a taxicab, and had been operating it as such from the time he purchased it until the time of the accident. He had no other business, and whatever money he paid to appellant on the purchase price of the automobile was paid out of his earnings. There is no evidence that the appellant had any control over the conduct of Frazier in operating the automobile, or that Frazier was required to make any report to him concerning the operating of the automobile or the business in which it was being used. All the right that appellant had in the matter was, in

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case the installments on the purchase price were not paid as they became due, to take possession of the car. There is not a particle of evidence in the record to show that Frazier was an employe or servant of appellant. That being true, the court erred in overruling the motion for a new trial.

Judgment reversed for proceedings not inconsistent with this opinion.

STECKBECK v. WORMAN.

[No. 10,145. Filed December 18, 1919.]

1. *APPEAL.—Negligence.—Conflicting Evidence.—Review.—Highways.*—Where there is evidence to support the verdict, and a sharp conflict as to which of the two drivers of colliding automobiles was guilty of negligence causing the collision, the evidence will not be weighed on appeal. p. 667.
2. *TRIAL.—Evidence.—Exhibits.—Inspection by Jury.—Exhibits* not formally introduced in evidence are correctly excluded from inspection by the jury. p. 668.
3. *EVIDENCE.—Introduction.—Connecting Evidence.—Exhibits.*—The court may properly require proof that there was no change in the condition of the automobile of defendant after the collision in issue and before photographs thereof were taken, as a condition to permitting the exhibition of such photographs to the jury. p. 668.

From Allen Superior Court; *Carl Yapple*, Judge.

Action by Floyd M. Worman against William J. Steckbeck. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Robert B. Dreibelbiss, for appellant.

Herbert L. Somers and *Harry F. Kenmerk*, for appellee.

McMAHAN, J.—Complaint by appellee for damages to his automobile caused by the alleged negligence of appellant. The jury returned a verdict in favor of appellee, and judgment was rendered accordingly.

The only error assigned is the overruling of the motion for a new trial.

The first contention of appellant is that the verdict is not sustained by sufficient evidence. The accident occurred on a country road about 6:30 p. m.,

1. December 2. Appellee and his witnesses testified in substance that the appellant was driving his automobile from twenty-five to thirty miles an hour in violation of the law; that his lights were bright; that he did not slow up, but came straight at appellee; that appellee was driving his car about eight or ten miles an hour and, on seeing the appellant coming, drove over to the side of the road and stopped his car; that appellant did not slow his car, but ran into the appellee's car, injuring the same. Some of appellee's witnesses testified that appellant was "zig-zagging" across the road and that, when about thirty feet from appellee, he drove in a diagonal direction, striking the front wheel of appellee's car. Appellant and his witnesses testified to an entirely different state of facts. They testified in substance that appellee was driving his car from twenty-five to thirty miles an hour, had but one headlight which, being bright and glaring, blinded appellant; that appellee drove his car from one side of the road to the other, and that appellant was driving about eight miles an hour instead of twenty-five to thirty miles an hour, and that appellee ran his car into appellant's car. There was a sharp conflict in the evidence. It was the province of the jury to determine the weight

of the evidence and the credibility of the witnesses. The jury returned a verdict in favor of appellee and, there being evidence to support their verdict, we will not weigh the evidence.

Appellant also contends that the court erred in refusing to permit the jury to inspect a photograph of appellant's car, which he says was admitted 2-3. in evidence. The record, however, discloses that appellant offered to introduce the photograph in evidence and that plaintiff objected. The record does not clearly disclose whether the photograph was introduced in evidence or not. It appears from the evidence that on the day after the accident two photographs, A and B, were taken of appellant's car. Appellee's objection to admitting photograph A in evidence was overruled. Nothing more is shown relative to A. The record does not disclose that after the ruling of the court it was actually introduced in evidence. Appellant then offered to introduce B in evidence, to which appellee made objection. Appellant then made an offer to exhibit A and B to the jury. The court overruled the offer of appellant to exhibit them to the jury until evidence was introduced showing the relation of the cars to each other. No evidence had been introduced to show that at the time the photographs were taken appellant's car was in the same condition that it was in immediately after the accident. It is evident from the statement of the court that neither A nor B had been formally introduced in evidence. That being true, the court correctly refused to allow them to be exhibited to the jury. There was no hardship imposed on appellant by requiring him to prove that there had been no change in the condition of his automobile after the

accident and before the photographs were taken. Appellant contends that the proximate cause of the injury to appellee's automobile was the fact that appellee had but one light on the front of his car and was running the same in violation of §10476 Burns 1914, Acts 1913 p. 779, §13. The jury, however, found otherwise, and there is evidence to support that finding.

There was no error in overruling the motion for a new trial. Judgment affirmed.

BURCHAM v. ROACH ET AL.

[No. 10,101. Filed December 18, 1919.]

1. **ADVERSE POSSESSION.**—*Elements.*—There are five indispensable elements in "adverse possession," namely, it must be hostile and under claim of right, actual, open and notorious, exclusive, and continuous. p. 671.
2. **HUSBAND AND WIFE.**—*Adverse Possession.*—*Joint Possession.*—Neither husband nor wife can acquire title by adverse possession to land owned by the other by joint occupation during coverture. p. 672.
3. **HUSBAND AND WIFE.**—*Adverse Possession.*—*Joint Possession.*—*Effect.*—Joint possession by husband and wife of the land of the husband is in law the possession of the husband. p. 674.
4. **BOUNDARIES.**—*Adverse Possession.*—*Husband and Wife.*—*Acquiescence.*—In an action by the wife after divorce to quiet title to part of an adjoining tract owned by the husband, the fact that for more than twenty years he had acquiesced in the location of a fence which included part of his land with the wife's property, does not establish the fence as the real boundary line, where husband and wife occupied both tracts jointly, since a contrary claim is in reality a claim by adverse possession. p. 674.
5. **ADVERSE POSSESSION.**—*Boundaries.*—*Deeds.*—*Admissibility.*—In an action to quiet title, under a claim of adverse possession to a certain fence, deeds that in no manner refer to the fence or division line held properly excluded. p. 674.

Burcham v. Roach—71 Ind. App. 669.

From Greene Circuit Court; *Theo. E. Slinkard*, Judge.

Action by Merab Burcham against Hayes Roach and another. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

William L. Slinkard and *Will R. Vosloh*, for appellant.

James M. Hudson, for appellees.

McMAHAN, J.—This action was commenced by the appellant against Hayes Roach, Ann Roach and Henry Burcham to quiet title to certain real estate in Greene county, Indiana.

Appellant and Henry Burcham were married in March, 1888, and lived together as husband and wife until November, 1915. They were divorced in May, 1916. At the time of this marriage Henry Burcham and his mother were the owners of a 200-acre farm which included the land in controversy. In September, 1888, Henry Burcham and his mother conveyed the south 120 acres of said farm to appellant, the consideration being love and affection. At that time appellant and her husband were living on the north eighty acres of said 200-acre farm. A few months later they moved into a house on the 120-acre tract, where they continued to reside until 1894, when they again moved into the house on the eighty-acre tract, and continued to live there until their separation in 1915. In November, 1892, Emily J. Burcham, who then owned said north eighty acres, which included the land in controversy, conveyed the same to Henry Burcham, who held the record title thereto until July, 1916, when he conveyed it to appellee Ann Roach. Henry Burcham with his family occupied and farmed

the 120 acres and the eighty acres immediately north of it, of which he held the record title as one farm from 1894 until after he and appellant separated in 1915. There has never been a fence on the division line between said 120 and eighty-acre tracts. There was in 1888, and ever since has been, a fence extending in a northwesterly direction from a point fourteen rods north of the southeast corner of said eighty acres to a point twenty-nine rods north of the southwest corner thereof.

Appellant in her complaint alleged that she was the equitable owner of the tract of land lying north of said 120 acres and south of said fence; that she had been in "open, adverse, notorious, continuous and exclusive possession" of said strip of land for more than twenty years, and asked that her title thereto be quieted.

During the trial appellant dismissed as to Henry Burcham, and at the conclusion of appellant's evidence the court instructed the jury to the effect that a wife who is living with her husband on a tract of land owned by him cannot acquire title to any part of his land by adverse possession, and directed them to return a verdict for appellees.

Appellant contends that the court erred in so instructing the jury, and in refusing to permit her to introduce and read in evidence certain deeds.

The main question for our consideration is whether a wife can acquire prescriptive title to the lands of her husband while they hold joint possession.

1. There are five indispensable elements in adverse possession, namely: (1) It must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be

exclusive; (5) it must be continuous. *Worthley v. Burbanks* (1897), 146 Ind. 534, 45 N. E. 779.

If it be conceded that a husband or wife, under any circumstances, can acquire title to the lands of the other by adverse possession, they certainly

2. cannot do so by having a joint possession with each other. One of the essential elements of adverse possession is that the possession must be exclusive. Two persons cannot hold the same property adversely to each other at the same time. *Hinton v. Farmer* (1906), 148 Ala. 211, 42 South. 563, 121 Am. St. 73.

"It is well settled that the seizin and possession of one of several tenants in common are the seizin and possession of all. * * * There is not the slightest ground for claiming that the possession of Dyer during the lifetime of his wife was adverse to her nor that it was exclusive. So far as the facts are disclosed by the record, they occupied the premises together * * *." *Bader v. Dyer* (1898), 106 Iowa 715, 77 N. W. 469, 68 Am. St. 332.

The Supreme Court of Alabama, in passing upon this question, said: "Possession to be adverse must be exclusive, and, therefore, two persons cannot hold the same property adversely to each other at the same time, and for the additional reason furnished by the common law unity of coverture, * * *. If either had owned the legal title, the law would have referred the joint occupancy to the right of such owner; but in the absence of title in either it was possible for an adverse possession to have been established in either." *Stiff v. Cobb* (1899), 126 Ala. 381, 28 South. 402, 85 Am. St. 38.

"Where there are two or more persons in posses-

sion, each under a separate conveyance or color of title, the possession will be treated as being in him who has the better title. As there cannot be a concurrent seizin of the land, but may be a concurrent possession, the seizin is deemed to be in him who has the better title. * * * The present case is, therefore, like that where husband and wife are in possession of land owned by the wife and to which he has no title whatever. That their possession in such a case would be the possession of the wife, there can be no doubt." *Potter v. Adams* (1894), 125 Mo. 118, 28 S. W. 490, 46 Am. St. 478.

In the case of *Union Oil Co. v. Stewart* (1910), 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A 567, the court said: "We see no sufficient reason for the determination that a wife cannot, under any circumstances, acquire title to her husband's land by continuous exclusive possession adversely to him. It may be conceded that she could not do so while they were living together and he remained the head of the family."

The court in *Mauldin v. Cox* (1885), 67 Cal. 387, 77 Pac. 804, said: "We conclude that during coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other." For other cases see *Blair v. Johnson* (1905), 215 Ill. 552, 74 N. E. 747; *Powell v. Felton* (1850), 33 N. C. 469; *Skinner v. Hale* (1903), 76 Conn. 223, 56 Atl. 524; *Hovorka v. Havlik* (1903), 68 Neb. 14, 93 N. W. 990, 110 Am. St. 387; *Springer v. Young* (1886), 14 Ore. 280, 12 Pac. 400; *Reagle v. Reagle* (1897), 179 Pa. St. 89, 36 Atl. 191; *Hays v. Marsh* (1904), 123 Iowa 81, 98 N. W. 604.

Appellant's husband, Henry Burcham, held the rec-

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ord title to the land in controversy. Appellant had no title to such land. Their joint possession

3. of such land was in law the possession of Henry Burcham, the legal owner.

Appellant contends that, even though she could not hold the land adversely to her husband, she became the owner of it because they each occupied

4. and cultivated the land to the fence, and for a period of more than twenty years her husband acquiesced in the location of the fence as a boundary line. Inasmuch as their occupancy was joint, this contention cannot prevail. Appellant cannot escape the fact that her claim of title rests on adverse possession.

The grantor and grantee in one of the deeds which the court refused to admit in evidence were strangers to the title, while the other deeds were for the

5. eighty acres. No reference was made in any of these deeds to the fence or the division line and could in no manner affect the rights of appellant or appellees. There was no error in excluding them.

Judgment affirmed.

W. P. NELSON COMPANY v. WEYL, RECEIVER, ET AL.

[No. 10,094. Filed December 18, 1919.]

1. *APPEAL.—Exceptions.—Conclusions of Law.—Modification of Judgment.*—Where the judgment follows the conclusion of law, error, if any, is in the conclusion and not in the judgment, and the remedy is by excepting to the conclusion of law and not by moving to modify the judgment. p. 681.

W. P. Nelson Co. v. Weyl, Rec.—71 Ind. App. 674.

2. **MECHANICS' LIENS.**—*Notice.—Time for Filing.—Estoppel of Owner.*—The date of repainting fixes the time for the beginning of the period within which to file a notice of mechanic's lien, where the work contracted for had been fully done more than sixty days prior thereto, but had been refused by the lessee as incomplete and the repainting demanded, since it will be assumed that the lessee acted in good faith, and, although its contentions were wrongful, it is estopped from claiming, in a suit to enforce rights conferred by the lien, that the contract was in fact completed in the first instance. p. 681.

From Marion Superior Court (103,458); *Theophilus J. Moll*, Judge.

Proceeding upon petition by W. P. Nelson Company in the matter of the receivership of the Strand Theater Company (of Indiana), Carl L. Weyl, receiver. From the judgment rendered, the petitioner appeals. *Reversed.*

Newberger, Simon & Davis and Weir, Ritter & Richards, for appellant.

Matson, Kane & Ross, Robert D. McCord, Adolph A. Schreiber and Weyl & Jewett, for appellees.

McMAHAN, J.—The Strand Theater Company of Illinois and Ernest C. Divine were lessees of the Park Theater in the city of Indianapolis. On October 26, 1915, said lessees entered into an agreement with the appellant whereby they employed appellant, and the appellant agreed to furnish material and perform the necessary labor in overhauling and remodeling the theater building.

Appellant began this work in December, 1915, and continued the same in accordance with the specifications, except that by agreement one item was omitted and a credit of \$60 was allowed therefor. Some extra work was done as provided in the contract of the value of \$1,234. Said Strand Theater Company of

Illinois and said Divine subleased said theater building to the Strand Theatre Company of Maine in January, 1916, and said lease for the said theater was thereafter assigned to the Strand Theater Company of Indiana, which will herein be designated as the Indiana company. As a part of the consideration for the assignment to it, the Indiana company assumed and agreed to pay all contracts, agreements and other obligations entered into, and all expenses incurred or undertaken in connection with the improvement and equipment of said building, among which were debts and obligations to the appellant on account of its contract with the original lessees.

On June 24, 1916, appellant filed a notice in the office of the recorder of Marion county, Indiana, of its intention to hold a lien upon the real estate upon which said building is located, and upon the leasehold interest of said lessees in said real estate, for the sum of \$5,159.20 for the work and labor done and material furnished under said contract. Carl H. Weyl was appointed receiver of all the property and assets of the Indiana company, and as such receiver took possession of said theater building and premises, and the leasehold estate of said company therein, and continued in the possession thereof until August 5, 1916, when, under the orders of the court, he sold and assigned said leasehold to one Shafer Zigler.

Appellant filed its petition in said receivership matter alleging the facts as hereinbefore stated, and asking that its lien on the premises be transferred to the funds in possession of the receiver, and that the amount due thereon be decreed to be a preferred debt and claim and a lien upon the funds in the hands of the receiver derived from the sale of said lease and leasehold estate.

The cause was tried by the court, and at the request of the parties the court found the facts specially. The court stated its conclusion of law thereon to the effect that the appellant was entitled to recover as a general creditor in the sum of \$5,158.75, and judgment was rendered accordingly, without any right to a lien or priority on the funds in the hands of the receiver.

Appellant's exception to the conclusion of law presents the only question for our determination. The only question presented by the record is: Was the notice of the mechanic's lien filed within the sixty days after the furnishing of the materials and the performance of the labor as required by the statute? The court found the facts in substance as hereinbefore stated. The court also found that all the materials and all of the work which was done and performed by appellant were fully completed by appellant during the last week in January, 1916, and before the first day of February; that said work and materials were accepted by the Indiana company through its duly authorized representative at said time; that thereupon appellant removed all of its apparatus and material from said premises and turned said theater and work over to the Indiana company and rendered its statement for said labor and materials, and that said work at that time was completed in accordance with the contract between the Strand Theater Company of Illinois and appellant, and was done in a proper and complete manner; that during the early part of February, 1916, and when said bill for said work was submitted to the Indiana company, it, through its president, objected and urged that certain portions of the work were not properly done, but waived all objections, except the painting of the can-

opy in front of said theater, and requested appellant to repaint the same. The court finds that said canopy originally, in the latter part of January, 1916, was properly painted and accepted by the said theater company as aforesaid, but that on account of the action of inclement weather, and on account of the public coming in contact with the same it became despoiled; that nothing was done towards the repainting of said canopy by appellant until May 12, 1916, at which time, without making any charges or receiving any compensation therefor appellant repaired the painting of said canopy by repainting and retouching parts and portions thereof at an expense of \$4.65; that in the interim between February 1, 1916, and May 12, 1916, appellant did no work and furnished no material towards the labor or improvement of said theater, and that after appellant so submitted its bill for said work and materials in the early part of February, 1916, and after it was presented to the president of the Indiana company, said company refused to make any payment on account of said bill until said appellant repainted said canopy. On May 16, 1916, the Indiana company paid appellant \$1,000, and on June 7, 1916, \$500, to apply on account of said contract. The value of all the materials furnished and labor performed by appellant under the contract was found to be \$6,345. In addition to the said materials and labor, appellant performed other work and sustained loss on account of certain items which the court found amounted to \$313.75, and which was not included in said contract.

Appellee contends that, under the facts found by the court, the contract was completed by appellant in January, 1916, and that the work of repainting said

canopy did not, under the facts, extend the time within which appellant could file its notice of a mechanic's lien. Appellant contends that the owner or lessee of the property, having refused to make any payment on the contract, and having demanded that such additional work be performed before any payment would be made, is estopped from claiming that the work was completed according to the contract in January, 1916.

In *Scheible v. Schickler* (1896), 63 Minn. 471, 65 N. W. 920, furnaces were put in a building and were warranted as to their capacity. The contract was fully performed, and the work accepted, but the furnaces did not fulfill the warranty. Under a subsequent contract, the contractor, in satisfaction of all damages, agreed to substitute certain other furnaces, which he did. The notice of lien was there filed within ninety days after the completion of the last work, but more than ninety days after the completion of the first work, and was held filed in time. In *Shaw v. Fjellman* (1898), 72 Minn. 465, 75 N. W. 705, the court in discussing a similar question said: "After it was supposed that the work had been completed, and it was accepted or taken possession of by the owner, he or his agent might extend the time for filing a lien by requiring additional work to be done to remedy defects subsequently discovered, and the time for filing the lien would commence to run from the completion of such additional work." Citing *St. Louis Nat. Stock Yards v. O'Reilly* (1877), 85 Ill. 546; *Jeffersonville Water Supply Co. v. Riter* (1894), 138 Ind. 170, 37 N. E. 652; *McIntyre v. Trautner* (1883), 63 Cal. 429.

The Supreme Court of Minnesota, in *Minneapolis*

Trust Co. v. Great Northern R. Co. (1898), 74 Minn. 30, 76 N. W. 953, wherein a like question was involved, said: "True, Ring & Tobin had completed their work properly, and were not obliged to furnish any more stone. But the railway companies demanded the change, and consented to the furnishing of more material in order to make that change. By demanding additional material before making payment, Maxfield assumed that Ring & Tobin had not completed their contract, and is now estopped to say that they had." This case again came before the Supreme Court in *Minneapolis Trust Co. v. Great Northern R. Co.* (1900), 81 Minn. 28, 83 N. W. 463, where the court said: "By requesting Ring & Tobin to furnish the additional material before making payment, Maxfield, the contractor, assumed that Ring & Tobin had not completed their contract, and is now estopped from saying that they had;" and held that plaintiff was entitled to the enforcement of a mechanic's lien. See, also, *Nichols v. Culver* (1883), 51 Conn. 177.

The appellant performed labor and furnished material under the contract of the value of \$6,345, for which it had been paid \$1,500. It also performed other labor and suffered loss amounting to \$313.75. Appellant does not claim that it was entitled to a lien on the funds in the hands of the receiver derived from the sale of the leasehold estate, on account of the said sum of \$313.75, but does contend that it was entitled to have a lien on said funds for the balance of \$4,845 with interest, due it on account of the labor performed and materials furnished under the contract.

Appellee contends that, the judgment being right in so far as the \$313.75 is concerned, no question is

presented, for the reason that no motion was

1. made to modify the judgment. The judgment followed the conclusion of law. The error, if any, was not in the judgment, and could not be reached by a motion to modify. If the judgment had not been in accordance with the conclusion of law, a motion to modify it so as to conform with the conclusion of law would have been proper. Where the error is in the conclusion of law, the remedy is by excepting to the conclusion of law, and not by motion to modify either the conclusion or the judgment.

This is not a case where the contractor is attempting to revive a right to a lien already lost by voluntarily doing some work not required under his

2. contract. Here the contractor had performed work and furnished material of the value of \$6,345, and was entitled upon giving the statutory notice to a lien for that amount. There was also the further sum of \$313.75 due appellant for which it was not entitled to a lien. The theater company, when the bill for the amount due appellant was presented to it for payment, objected and urged that portions of the work were not properly done, and requested that the canopy be repainted, and refused to make any payment on the bill until appellant repainted the canopy. We here have the owner of the property insisting that the work is not completed and refusing to make any payment to the contractor until it is completed as the owner insists it should be—a case where the contractor, in order to get his pay, accedes to the wrongful contentions of the owner. Under such a state of fact, we are of opinion that the owner of the property is estopped from claiming that the contract was in fact completed in the first instance and profit

by its own wrong in refusing to make any payment for the work which had been fully and honestly performed. The appellee receiver is in no better position than the owner of the leasehold interest which was sold.

The appellee is in no position to insist that the repainting of the canopy was a new arrangement wholly independent and separate from the original contract. There is no fact found which indicates that the item of repainting was not done by appellant in good faith for the purpose of completing its contract. Where the contrary is not found, we will presume that both parties were acting in good faith, and that, when the theater company insisted that the contract was not completed, it honestly believed it was right in that contention. We hold that the repainting of the canopy was "the last item" performed under the contract, and that the time for filing notice of a mechanic's lien dated from May 12, 1916. *Conlee v. Clark* (1896), 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. 298; *Whitcomb v. Roll* (1907), 40 Ind. App. 119, 81 N. E. 106.

The court erred in its conclusion of law. The judgment is reversed, with direction to the court to restate its conclusion of law in accordance with this opinion.

CHRISTLIEB v. CHRISTLIEB.

[No. 10,151. Filed December 19, 1919.]

1. **APPEAL.**—*Pleading.*—*Admission by Demurrer.*—*Judgment on Failure to Plead.*—*Review.*—The judgment must be affirmed if

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- either paragraph of the complaint states a cause of action, where the defendant has demurred to each paragraph and has elected to abide the ruling of the court thereon and refused to plead further, since by the demurrer he admits the facts well pleaded. p. 684.
2. **MARRIAGE.—*Fraud, Voidable.—Equity.—Jurisdiction.***—A marriage procured by fraud is voidable at the suit of the injured party, and courts having the jurisdiction of courts of equity have jurisdiction to annul a marriage on account of fraud under their general powers to annul fraudulent contracts. p. 685.
3. **MARRIAGE.—*Age.—Consent of Parents.—Fraud.***—The mere fact that a girl was but sixteen years old and was married without the consent of her parents would not render the marriage void, notwithstanding the statute requiring parental consent, but such youthfulness is an important allegation in support of the charge of fraud. p. 686.
4. **MARRIAGE.—*Annulment.—Fraud.—Public Policy.—Pleading.***—Where the complaint averred that the marriage sought to be annulled had never been consummated by cohabitation, the rule against considering the alleged misrepresentations to a girl sixteen years old, as to character, previous marriage, children, etc., as such fraud as goes to the fundamentals or essentials of the marital relation, does not apply, but public policy would seem to require an annulment of the marriage, and all such allegations, taken together, state a cause of action for fraud and authorize the annulment of the marriage. p. 687.
5. **MARRIAGE.—*Annulment.—Conflict of Laws.***—The fact that the parties were married in Michigan can be no defense to a suit for annulment for fraud, brought in Indiana. p. 688.

From LaGrange Circuit Court; *James S. Drake*, Judge.

Action by Sylvia Melvina (Bennett) Christlieb, by next friend, against Ephraim Christlieb. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Redmond & Emerick and *Dunten & Dunten*, for appellant.

Hanan, Watson & Hanan, for appellee.

REMY, P. J.—Suit by appellee to annul her mar-

riage to appellant. The complaint is in two paragraphs. Appellant's demurrer for want of facts to each paragraph was overruled, and upon his refusal to plead further judgment was rendered annulling the marriage. Errors assigned are: (1) Overruling demurrer to first paragraph of complaint; (2) overruling demurrer to second paragraph of complaint.

Appellee by each paragraph of complaint sought to annul the marriage. By his demurrers appellant admits the facts well pleaded in each paragraph

1. and, having elected to abide the ruling of the court and having refused to plead further and suffered judgment to be taken against him, it necessarily follows that, if either paragraph of the complaint states a good cause of action for the annulment of the marriage, the judgment must be affirmed. *Williams v. Wood* (1915), 60 Ind. App. 69, 107 N. E. 683; *Buckel v. Auer* (1918), 68 Ind. App. 320, 120 N. E. 437.

The material averments of the first paragraph of complaint, hereinafter termed the complaint, are as follows: That on August 29, 1916, appellee entered into a certain marriage ceremony and pretended marriage with appellant at Centerville in the State of Michigan; that said marriage was illegal and void for the following reasons: That appellee was at the time but sixteen years of age, and that the pretended marriage was without the consent of her parents, who were at the time residents of LaGrange county, Indiana; that prior to said marriage appellant had falsely and fraudulently represented to appellee that he had never been married, had no children, and was a man of good character in the community where he had lived; that appellee, being ignorant as to the truth

of such representations, believed the same to be true, and, relying thereon, entered into the marriage contract; that said representations were false and known by appellant to be false at the time made, and were made for the purpose of deceiving appellee and inducing her to enter into said marriage; that appellant had been married and was the father of three children; that in 1914 appellant was divorced from his former wife; that the custody of two of said children was awarded to appellant, and he is now under order of court to support the same; that appellant is a drinking man who spends his earnings in riotous living and debauchery, and that he is dishonest; that the parties "have never lived or cohabited together as husband and wife." Prayer that the marriage be declared void.

It will be observed that the complaint is not based upon §5 of the acts of 1905 (Acts 1905 p. 215, §835 Burns 1914), regulating marriages, or upon

2. any other statute, but proceeds upon the theory of actual fraud in procuring the marriage contract. The law is well established that a marriage procured by fraud is voidable at the suit of the injured party, and that courts having the jurisdiction of courts of equity under their general powers to annul fraudulent contracts also have jurisdiction to annul a marriage on account of fraud (*Henneger v. Lomas* [1896], 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848); but what would constitute such fraud as to authorize the annulment of a marriage has not been determined by the courts of appeal of this state.

It is the contention of appellant that facts are not averred in the complaint which show "such fraud as goes to the fundamentals or essentials of the marital

relation," and that therefore the complaint is insufficient. It has been held in some jurisdictions that misrepresentations as to personal character, or as to the fact of a previous marriage, and that the party had children by such marriage, are representations as to matters which do not compose the essential elements on which the marital relation rests, and for that reason do not constitute such fraud as would vitiate the marriage contract when once executed. *Reynolds v. Reynolds* (1862), 3 Allen (Mass.) 605; *Donnelly v. Strong* (1900), 175 Mass. 157, 55 N. E. 892; *Varney v. Varney* (1881), 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726; 26 Cyc 833. The reason for the rule is that, where the family has once been established, it is not a matter merely between the husband and wife; that children, born and unborn, have an interest; that it becomes a matter of public concern; and therefore the validity of a marriage must not rest upon stipulations which are not essential to the marital relation.

The allegations of the complaint which refer to appellant's fraudulent representations as to his personal character and his former marriage are

3. not, however, the only averments going to the charge of fraud. It is also alleged that appellee was but sixteen years of age, and, although appellant's age is not given, it may nevertheless be inferred from the facts set forth in the complaint that he was much older. The mere fact that appellee was but sixteen years old at the time, and was married without the consent of her parents, would not, under the statute requiring parental consent to the marriage of a girl of that age (§8371 Burns 1914, §5328 R. S. 1881), render the marriage void, even if

the marriage had taken place in Indiana. *Franklin v. Lee* (1902), 30 Ind. App. 31, 62 N. E. 78. Nevertheless, when taken in connection with the other allegations of the complaint, the statement that she was only sixteen years of age is an important allegation in support of the charge of fraud. As is well stated by Bishop in his valuable work on Marriage, Divorce and Separation §506: "The fact is always relevant, if it exists, that when the fraud was practiced the complaining party was of years too immature to be presumably as capable as older persons of resisting its influence."

Another averment of the complaint, and perhaps the most important, is that the parties "have not lived or cohabited together as husband and
4. wife." Where a marriage has not been consummated, the reason for the rule above stated, and therefore the rule itself, do not apply. No unborn children "will cry out from the mother's womb demanding that they may not be bastardized, lose a father, and know only a disgraced mother." In the case under consideration, the public can be in no way interested in affirming the marriage. On the contrary, public policy would seem to require an annulment of the marriage. If the marriage is declared valid, it will be in name only, preventing the parties from marrying again. We are therefore constrained to hold that the allegations of the complaint, when taken together, state a cause of action for fraud, and authorize the annulment of the marriage. The following authorities uphold the doctrine forming the basis of this opinion: *Weill v. Weill* (1918), 104 Misc. Rep. 561, 172 N. Y. Supp. 589; *Smith v. Smith* (1898), 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800,

Hardy v. Smith—71 Ind. App. 688.

68 Am. St. 440; *Lyndon v. Lyndon* (1873), 69 Ill. 43; 1 Bishop, Marriage, Divorce and Separation §§456, 461; Nelson, Divorce and Separation §612. See, also, *Cunningham v. Cunningham* (1912), 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

The fact that the parties were married in the State of Michigan can be no defense to a suit brought

5. in Indiana to have the marriage annulled for appellant's fraud as charged in the complaint.

There was no error in overruling appellant's demurrer to the complaint. Judgment affirmed.

HARDY ET AL. v. SMITH ET AL.

[No. 9,898. Filed May 29, 1919. Rehearing denied October 10, 1919. Transfer denied December 19, 1919.]

1. *WILLS.—Construction.—Intention of Testator.*—In construing the provisions of a will, the court must be guided by the intention of the testator. p. 691.
2. *WILLS.—Construction.—All Words and Clauses Considered.*—In searching a will for the testator's intention, every word and clause must be considered, and, if possible, given effect. p. 691.
3. *WILLS.—Construction.—Partial Intestacy.*—Unless compelled by the language used, a construction of a will resulting in partial intestacy will be avoided. p. 691.
4. *WILLS.—Construction.—Remainders.—Contingent or Vested.*—A remainder will not be construed to be contingent, if it can be construed to be vested. p. 691.
5. *WILLS.—Construction.—Vested Remainder.*—Under a will giving life estates in certain land to the husband and brother of testatrix, and, subject thereto, devising said land and all real estate owned at her death to a niece for life, or in case of her death prior to death of testatrix, or the death of the husband and brother, then at the niece's death, or the death of the husband and brother, the fee simple of all said real estate to vest abso-

lutely in two daughters of the niece, as tenants by entirety, the survivor to take the whole, and where the husband and brother died before the death of the testatrix, the daughters took a vested remainder in fee at the death of the testatrix. p. 691.

6. *WILLS.—Construction.*—"Or" Construed "And."—When from the wording of a will it is obviously necessary in order to carry out the intention of the testator, the word "or" will be construed as "and." p. 692.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by Wilson A. D. Hardy and others, against Miranda Smith and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed*.

L. D. Boyd, Murat W. Hopkins and *George W. Julien*, for appellants.

William C. Smith, John H. Cartwright and *Quincy A. Myers*, for appellees.

REMY, J.—Mary A. Lamb, by item 3 of her will, devised to her husband, William R. Lamb, and her brother, Alexander Hardy, each a life estate in certain lands therein described. Item 4 of said will is as follows:

"Item 4. Subject to the provisions of item three, in favor of my husband and my brother, Alexander, I devise the said real estate described in item three and all the real estate of which I may die the owner, to my niece Miranda Smith of Kokomo, Indiana, for and during the term of her natural life, or in case of her death prior to my death, or the death of my husband and brother, then at her death, or the death of my husband and brother, the fee simple of all of said real estate shall vest absolutely in Lily Smith and

Mary P. Smith, daughters of said Miranda Smith, as tenants by the entirety the survivor to take the whole.”

Appellants prosecuted this suit against appellees to quiet title to eight-tenths of the said real estate, and to construe said will. Appellees are the persons named as devisees in said item 4.

The complaint alleges that the said husband and brother died seven years prior to the death of testatrix; that appellants, among others, are the heirs at law of testatrix; that said testatrix died intestate as to the fee simple of the said lands, and that the fee simple of the undivided eight-tenths thereof is in appellants. Appellees’ demurrer to the complaint for want of facts was sustained, and judgment was rendered for appellees upon the refusal of appellants to plead further. The action of the court in sustaining the demurrer is the only error assigned.

The controversy involves the construction of item 4 of said will. It is contended by appellants that the devise to appellees Lily Smith and Mary P. Smith was, by the terms of said item 4, contingent upon the death of devisee Miranda Smith prior to the death of the husband and brother of testatrix; and, inasmuch as this contingency did not happen, and cannot now happen, this conditional devise failed, and that testatrix died intestate as to said real estate. On the other hand, appellees take the position that item 4 of the will must be construed as devising the fee simple of said real estate to appellees Lily Smith and Mary P. Smith, their right of enjoyment being postponed until the termination of the life estates devised, and that as to said real estate testatrix died testate.

In construing the provisions of a will, we must be

guided by the testatrix' intention, and in search for such intention every word and clause of the

1-4. will must be considered, and, if possible, given effect. *Fenstermaker v. Holman* (1902), 158 Ind. 71, 62 N. E. 699. A construction resulting in a partial intestacy will be avoided unless the language of the will is such as to compel such construction. *Keplinger v. Keplinger* (1916), 185 Ind. 81, 113 N. E. 292. It is also a rule of construction that a remainder will not be construed to be contingent, if it can be construed to be vested. *Linscott v. Trowbridge* (1916), 224 Mass. 108, 112 N. E. 956. See, also, *Aldred v. Sylvester* (1916), 184 Ind. 542, 111 N. E. 914.

A careful examination of the will, keeping in mind these rules of construction, leads to the conclusion that it was the intention of the testatrix to

5. die testate as to all of her property, and that Lily Smith and Mary P. Smith should take the fee of the real estate subject only to the stipulated life estates. It is undisputed that item 3 gave to the husband of testatrix a life estate in said land in the event he outlived her; also a life estate in testatrix' brother during the years, if any, he outlived her husband. Item 4 provides: "Subject to the provisions of item three, I devise all the real estate of which I may die the owner, to Miranda Smith for and during her natural life"—thereby giving to Miranda Smith a life estate subject to the life estates mentioned in item 1. Then follows the clause upon which appellants base their contention, and which they claim amounts to a condition which has become impossible of performance, to wit, "or in case of her death prior to my death, or the death of my husband and broth-

er." What was testatrix' intention with reference to this clause? Plainly her purpose was merely to provide for the possibility of Miranda Smith dying before her life estate should vest, and to make it certain that Lily Smith and Mary P. Smith would take the fee in any event. In other words, testatrix did not want the vesting of the fee in remainder in Lily Smith and Mary P. Smith to be dependent upon the vesting of a life estate in their mother. This construction is borne out by the clause which follows, which clause provides: "Then at her death (the death of Miranda Smith) or the death of my husband and brother, the fee simple of all said real estate shall vest absolutely in Lily Smith and Mary P. Smith," etc.

It is apparent from the context of the will that testatrix improperly used the word "or" instead of the word "and." If we make the substitution,

6. that part of the will would read: "To my niece Miranda Smith of Kokomo, Indiana, for and during the term of her natural life, *and* in case of her death prior to my death or the death of my husband or brother, then at her death, or the death of my husband and brother, the fee simple of all of said real estate shall vest absolutely in Lily Smith and Mary P. Smith," etc., and there would be no uncertainty. The disjunctive "or" is not a technical word, and it is a well-known rule that, if from the wording of the will it is obviously necessary to carry out the intention of the testator, the word "or" will be construed as "and." *Janney v. Sprigg* (1848), 7 Gill (Md.) 197, 48 Am. Dec. 557, cases cited and note; 6 Words and Phrases 5007.

We conclude that appellees Lily Smith and Mary

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P. Smith took a vested remainder in fee in the real estate involved in this suit. The trial court correctly sustained appellee's demurrer to the complaint. Judgment affirmed.

DONNER v. GRIFFITH.

[No. 9,649. Filed February 18, 1919. Rehearing denied May 14, 1919. Transfer denied December 19, 1919.]

1. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer.**—In an action to enjoin the obstruction by an adjoining landowner of a strip of land claimed to be a public highway between his building and plaintiff's property, error, if any, in overruling a demurrer to a paragraph of complaint, demurred to on the ground that it constituted an attempt to vary or contradict the terms of a deed, was harmless, where the cause was decided on another paragraph of complaint which was based on the theory that the strip in dispute became a public highway by user. p. 696.
2. **ESTOPPEL.—Obstruction of Public Highway.—Action for Injunction.—Designation in Deeds as Private Way.—User.**—In an action to enjoin the obstruction by an adjoining landowner of a strip of land used by plaintiff as a driveway, plaintiff was not estopped to claim that the strip was a public alley because of the fact that in every conveyance in his chain of title the alley was designated as a private alley, where plaintiff's cause of action was based not upon the deeds, but upon the theory that the strip had become a public highway by user. p. 697.
3. **MUNICIPAL CORPORATIONS.—Public Highway.—Establishment by User.**—Where a landowner used an adjoining strip of land as a public highway for more than twenty years, he was entitled to the continued use thereof on the doctrine of user, although the land was situated within a city, as the doctrine of user is applicable to land within cities and towns, as well as without. p. 697.
4. **EVIDENCE.—Admissibility.—Deeds.—Form of Certificate.—Sufficiency.—Statute.**—A county recorder's certificate to copies of deeds reciting that each was a "true and correct" copy of the original was in substantial compliance with §478 Burns 1914,

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- §462 R. S. 1881, requiring certification that the copy is "true and complete," and such copies were admissible as evidence. p. 696.
5. EVIDENCE.—*Action to Enjoin Obstruction of Highway.—Conversation with Former Owner of Land.—Admissibility.*—In an action to enjoin the obstruction by an adjoining landowner of a strip of his land used by plaintiff as a driveway, a conversation between a former owner of plaintiff's property and the agent who sold the property to such former owner relating to an alleged parol license by which the agent authorized the use of the strip in controversy for a driveway, was admissible in evidence. p. 699.
6. APPEAL.—*Review.—Harmless Error.—Admission of Evidence.*—Error, if any, in the admission of evidence was harmless, where it affirmatively appeared that the court ignored such evidence. p. 699.

From Jackson Circuit Court; *Oren O. Swails*, Judge.

Action by Alexander T. Griffith against Fred G. Donner. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Montgomery & Montgomery, Baker & Richman and Walter L. Neible, for appellant.

John M. Lewis, William H. Everroad, Cassius B. Cooper, C. J. Kollmeyer and Julian Sharpnack, for appellee.

This action was instituted by appellee to enjoin appellant from erecting a permanent obstruction in and across a strip of ground ten feet wide and located between buildings owned by the parties, respectively, in the city of Columbus. The court made a special finding of facts, stated conclusions of law favorable to appellee, and perpetually enjoined appellant from obstructing said strip of ground.

The special finding of facts contains the following: "For thirty years prior to this action appellee and his grantors back to and including Charles B. Kerr continuously and uninterruptedly used said strip as

a right of way into and from the building on the real estate owned by them, which use was adverse to the use of appellant and his grantors and with their full knowledge and acquiescence. For more than twenty years prior to March 26, 1914, said strip had been unenclosed, without any building or improvement thereon. In 1877 appellee's grantors and the public generally began to use said strip for a public highway; and said use continued thereafter uninterruptedly and adversely to appellant and his grantors, under a claim of right by appellee and his grantors, for a period of more than twenty years and until March 26, 1914. On said date appellant was preparing to build a permanent brick and concrete wall across the end thereof which would prevent appellee from using his buildings for the purpose for which he constructed them, and which would cause him permanent injury; and that appellee would sustain special and peculiar damages not sustained by him in common with the general public."

The conclusions of law are: "That the law is with appellee. That the ten-foot strip, on March 26, 1914, was a public highway. That the public, including appellee, was entitled to the free and unobstructed use of said strip and that appellant should be enjoined from erecting said wall."

The following errors are relied on for reversal: (1) Overruling the demurrer to the fourth paragraph of complaint; (2) sustaining the demurrer to the second paragraph of answer; (3) sustaining the demurrer to the third paragraph of answer; (4) in the conclusions of law; and (5) the overruling the motion for a new trial.

DAUSMAN, C. J.—(1) The strip of ground in contro-

versy extends east and west through lots 28 and 29. Appellee owns a tract abutting on the south line of said strip. Appellant owns a tract abutting on the north line of said strip and also owns the fee in the strip. In the fourth paragraph of complaint it is alleged in substance: "That on October 20, 1877, George P. Bissell as administrator or trustee was in possession of, and had power to sell, said lots; that on said day he conveyed by deed to Keller & Brockman all that part of said lots situated on the north side of said strip, and as a part of said transaction and by the same deed, he conveyed to them a right of way over said strip so long as the real estate in said deed conveyed should be used for manufacturing purposes; that thereafter Bissell conveyed to Kerr, appellee's remote grantor, all that part of lot 29 and a portion of lot 28, situated south of, and abutting on, said strip; that in consideration of the purchase of said land by Kerr, and for the purpose of inducing Kerr to make the purchase, Bissell promised and agreed that said strip, which was then in use as a driveway, would be reserved and kept open as and for a driveway or alley for the use and benefit of the owners of the real estate on either side thereof."

The only objection to said fourth paragraph of complaint is directed against the averment concerning the parol agreement. This objection is on

1. the ground that said averment constitutes an attempt to vary or contradict the terms of the deed. The theory of said paragraph is that Kerr acquired from Bissell an irrevocable license to use said strip as a right of way which became an easement appurtenant to the real estate acquired by the former. The purpose of said averment is to reveal

the origin of the alleged easement and not to vary the terms of the deed. Moreover, the finding of facts and the conclusions of law disclose unmistakably that the entire controversy was decided on the first paragraph of complaint, which is on the theory that the strip in dispute became and is a public highway by user. Therefore, appellant was not harmed by the ruling on that demurrer. *Young v. Berger* (1892), 132 Ind. 530, 32 N. E. 318; *Olds v. Moderwell* (1882), 87 Ind. 582; *Barnett v. Gluting* (1891), 3 Ind. App. 415, 29 N. E. 154, 927; §407 Burns 1914, §398 R. S. 1881.

(2) The second paragraph of answer sets out appellee's record title to the real estate abutting on the south line of said strip. It is averred therein

2. that in every conveyance in this chain of title, from Bissell down to appellee, the strip is designated as the north boundary line and characterized as a private alley, but that no part of the strip has ever been conveyed to appellee. The theory of this pleading is that by reason of the recitals in said conveyances appellee is estopped to claim that the strip is a public alley. But appellee's cause of action is not based on the deeds or any of them. Therefore, the rule for which appellant contends is not applicable. *Simpson v. Pearson* (1869), 31 Ind. 1, 99 Am. Dec. 577; *McKinney v. Lanning* (1894), 139 Ind. 170, 38 N. E. 601.

(3) By the special finding and conclusions of law it clearly appears that the trial court based its decision exclusively on the ground that said strip

3. became a public highway by user. In some of the earlier cases the Supreme Court expressed a doubt as to whether a highway may be established

in this manner within the limits of a town or city. *Tucker v. Conrad* (1885), 103 Ind. 349, 2 N. E. 803; *Shellhouse v. State* (1887), 110 Ind. 509, 11 N. E. 484. But it is now settled that the doctrine of user is applicable within, as well as without, towns and cities. *Pittsburgh, etc., R. Co. v. Town of Crown Point* (1898), 150 Ind. 536, 50 N. E. 741; *German Bank v. Brose* (1903), 32 Ind. App. 77, 69 N. E. 300; *Town of Marion v. Skillman* (1891), 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55. See, also, Elliott, Roads and Streets (2d ed.) §159; 37 Cyc 12 *et seq.* Where the ground has been used by the public as a highway continuously for twenty years, the theory of a dedication may be ignored. *Cromer v. State* (1899), 21 Ind. App. 502, 52 N. E. 239. There is no error in the conclusions of law.

(4) Under the fourth assignment appellant presents the following contentions:

(a) That the evidence does not sustain that part of the decision wherein the court has found that the use of the strip by the public was adverse to appellant; but that the evidence "brings the case within a line of decisions which hold that where owners of land devote a portion of it for use as an alley for their own private purposes, such alley will not be converted into a public highway simply because the public also use it in conjunction with the owners." We have carefully examined the evidence, and we find that it tends fairly to support the finding in this respect.

(b) That the court erred in admitting in evidence certain copies of deeds, because the county recorder certified that each was a "true and correct"

4. copy of the original, instead of using the statutory words "true and complete." §478 Burns

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1914, §462 R. S. 1881. In this there was no error. The form of certificate is a substantial compliance with the statute. See *Keesling v. Truitt* (1868), 30 Ind. 306; *Cleveland, etc., R. Co. v. Gannon* (1916), 63 Ind. App. 289, 112 N. E. 411.

(c) That the court erred in permitting William H. Everoad to testify to a conversation between Buck Jones and C. D. Kerr. As Bissell's agent,

5. Jones sold the real estate now owned by appellee to Kerr, and the conversation related to the alleged parol license by which Kerr was

6. authorized to use the strip for a driveway as averred in the second paragraph of complaint.

We are of the opinion that the testimony was properly admitted. *Welz v. Rhodius* (1882), 87 Ind. 1, 44 Am. Rep. 747; *Robinson v. Thrailkill* (1887), 110 Ind. 117, 10 N. E. 647; *Dodge v. Johnson* (1904), 32 Ind. App. 471, 67 N. E. 560. In any event it was harmless, because it affirmatively appears that it was ignored by the court.

Judgment affirmed.

H. LOHSE COMPANY v. LOHSE.

[No. 10,490. Filed May 13, 1919. Rehearing denied June 27, 1919.]

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Hans Lohse against the H. Lohse Company. From an award for applicant, the defendant appeals. *Affirmed.*

J. W. Hutchinson, for appellant.

Durre & Curry, for appellee.

Buckler v. Senefeld—71 Ind. App. 700.

PER CURIAM.—It appears from the record that the appellee while in the employ of appellant received an injury by accident arising out of and in the course of his employment. The usual proceeding resulted in an award of compensation at the rate of \$12.38 per week during the period of total disability, not exceeding 500 weeks.

The appellant has presented nothing for the consideration of this court. Therefore the award is affirmed, and by virtue of the statute the amount is increased five per cent.

HAZELRIGG v. HICKS.

[No. 10,084. Filed October 29, 1919.]

From Posey Circuit Court; *Herdís Clements*, Judge.

Action between William Hazelrigg and Mary Hicks. From the judgment rendered, the former appeals. *Affirmed.*

Edgar Durre and *Clifford T. Curry*, for appellant.

Albert J. Veneman and *William C. Welborn*, for appellee.

REMY, J.—The questions presented by the record in this cause are in all respects the same as those involved in the case of *Wilson v. Bass* (1919), 70 Ind. App. 116, 118 N. E. 379, and upon the authority of that case the judgment is affirmed.

BUCKLER v. SENEFELD.

[No. 10,174. Filed November 21, 1919.]

From Franklin Circuit Court; *Raymond S. Springer*, Judge.

Action between Gifford Buckler and Mary Senefeld. From the judgment rendered, the former appeals. *Affirmed.*

I. N. McCarty, for appellant.

PER CURIAM.—Judgment affirmed.

DeCock v. DeGrover—71 Ind. App. 701.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. SANDERS.

[No. 10,131. Filed November 25, 1919.]

From Marion Superior Court (100,898); *Theophilus J. Moll*, Judge.

Action between Arthur C. Sanders and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment in favor of the former, the latter appeals. *Reversed.*

Pickens, Moores, Davidson & Pickens and *D. P. Williams*, for appellant.

Forney & Sipe, for appellee.

NICHOLS, C. J.—The facts in this case are substantially similar to those in the case of *Pittsburgh, etc., R. Co. v. Marable* (1920), 189 Ind. 278, 126 N. E. 849. On the authority of the judgment of that case the judgment in this case is reversed, with instruction to the trial court to grant a new trial.

DECOCK v. DEGROVER.

[No. 10,140. Filed November 25, 1919.]

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action between Phillemon DeCock and Matilda DeGrover. From a judgment for the latter, the former appeals. *Affirmed.*

Charles L. Metzger and *Isaac Kane Parks*, for appellant.

Drummond & Drummond, for appellee.

PER CURIAM.—There is no error in the record. Judgment affirmed, with ten per cent. penalty.

Pittsburgh, etc., R. Co. v. Miller—71 Ind. App. 702.

EQUITABLE SURETY COMPANY ET AL. v. STATE OF
INDIANA ON THE RELATION OF THE NATIONAL
BRIDGE COMPANY.

[No. 10,037. Filed November 26, 1919.]

From Marion Superior Court (100,505) ; *Linn D. Hay*, Judge.

Action by the State of Indiana on the relation of the National Bridge Company against the Equitable Surety Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Major A. Downing, for appellants.

Russell T. MacFall, for appellee.

REMY, J.—The questions involved in this appeal have, by this court, been decided adversely to appellant's contention in *Title Guaranty, etc., Co. v. State, ex rel.* (1916), 61 Ind. App. 268, 109 N. E. 237, 111 N. E. 19; *Illinois Surety Co. v. State, ex rel.* (1919), 69 Ind. App. 450, 122 N. E. 30; and *Equitable Surety Co., etc. v. Indiana Fuel Supply Co.* (1919), 70 Ind. App. 75, 123 N. E. 22, and, on the authority of said cases, judgment is affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. MILLER.

[No. 10,096. Filed December 19, 1919.]

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by William H. Miller against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

M. Z. Stannard and *Jonas G. Howard*, for appellant.

T. H. Stradley, *George C. Kopp* and *Burdette C. Lutz*, for appellee.

McMAHAN, J.—The questions necessary to the decision of this case are the same as those decided in *Pittsburgh, etc., R. Co. v. Marable* (1920), 189 Ind. 278, 126 N. E. 849, and on the authority of that case this case is reversed, with instructions to sustain the motion of appellant for a judgment in its favor notwithstanding the general verdict.

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[NOTE.—The citation *Burcham v. Roach*, 669, 674 (5) indicates that the opinion begins on page 669, that the point appears on page 674, and that the point is numbered 5 in the margin.—REPORTER.]

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See HUSBAND AND WIFE 2, 3.

Joint occupancy of husband and wife, acquiescence, effect in establishing boundary, see BOUNDARIES 1.

1. *Boundaries.—Deeds.—Admissibility.*—In an action to quiet title, under a claim of adverse possession to a certain fence, deeds that in no manner refer to the fence or division line *held* properly excluded.
Burcham v. Roach, 669, 674 (5).

2. *Elements.*—There are five indispensable elements in "adverse possession," namely, it must be hostile and under claim of right, actual, open and notorious, exclusive, and continuous.

Burcham v. Roach, 669, 671 (1).

AGREED CASE—

See SUBMISSION OF CONTROVERSY.

AGRICULTURE—

1. *County Agricultural Societies.—Actions Against.—Defenses.—Ultra Vires Acts.—When Estopped to Plead.*—An incorporated county agricultural society which has received the benefit of automobile hire for which it has contracted, cannot be permitted to set up the defense, in an action for such services, that it had no power to make the contract.

Lake Co. Agri. Society v. Verplank, 186, 189 (5).

2. *Incorporated Agricultural Societies.—Powers.—Contracting for Automobile Hire.—Statutes.*—An agricultural society organized under §3195 *et seq.* Burns 1914, §2629 R. S. 1881, has implied power to contract for anything, such as the hiring of automobiles, that will further the purposes of the organization.

Lake Co. Agri. Society v. Verplank, 186, 189 (4).

ALIMONY—

See DIVORCE 1, 2; JUDGMENTS 4.

AMENDMENT—

See CONTINUANCE; PLEADING 2, 4, 5.

To pleading, discretion, see APPEAL 74.

ANNULMENT—

See MARRIAGE 2, 3.

APPEAL.

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Appeals from officers or administrative boards, see OFFICERS 1, 2.

Appeal from Industrial Board, see MASTER AND SERVANT 13-17.

I. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

1. *Origin of Right.*—The right of appeal is purely statutory.
Board, etc. v. First Nat. Bank, etc., 290, 295 (1).
2. *Right of.*—The right of appeal is wholly statutory, except where expressly secured by the Constitution.
Galvin v. Brown, 30, 32 (1).

II. DECISIONS REVIEWABLE.

3. *Bond.—Entry.—Construction.—General Rules.*—The rule that every clause and word of a written instrument should, when possible, be given some meaning, and a harmonious whole be made to appear, applies to the construction of an entry granting an appeal and fixing bond therefor.
Equitable Surety Co. v. Taylor, 382, 387 (3).
4. *Civil Code.—Statutory Proceedings.*—The provisions of the Code of Civil Procedure concerning appeal do not apply to special statutory proceedings which do not involve the exercise of judicial power. *Board, etc. v. First Nat. Bank, etc.*, 290, 296 (4).
5. *Depositories.—Bond Approval.—Right of Appeal from Circuit Court.*—An appeal will not lie from the action of the circuit court upon a bond submitted under the provisions of the Depository Law, §13, Acts 1907 p. 391, §7534 Burns 1914, since there is no specific provision therefor in such law, and since the proceeding provided for is of such a character as to exclude the application of the appeal provisions of the Code of Civil Procedure.
Board, etc. v. First Nat. Bank, etc., 290, 296 (6).

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6. *Final Judgment.—Motion for New Trial Filed After Judgment.—Ruling Thereon.*—The ruling on the motion for new trial, made after the entry of judgment, is taken as the final judgment within the meaning of the statute governing term-time appeals in civil cases.
Equitable Surety Co. v. Taylor, 382, 387 (4).
7. *Right of.—Statutes.—Compliance.*—The right of appeal is purely statutory, and a party seeking to avail himself thereof must comply with the statute providing therefor.
Equitable Surety Co. v. Taylor, 382, 385 (1).

III. PRESENTATION AND RESERVATION IN TRIAL COURT OF GROUNDS OF REVIEW.

See also 45, 56; EVIDENCE 7.

8. *Exceptions.—Sufficiency.*—An exception to the refusal to give "certain of the instructions requested" is joint and so indefinite as to present no question.
Public Utilities Co. v. Reader, Adms., 485, 496 (8).
9. *Exceptions.—Review.—Instructions.*—Where the record fails to show that any exception was taken to the refusal of a requested instruction, the error, if any, is not available on appeal.
Chesapeake, etc., R. Co. v. Perry, 506, 511 (5).
10. *Conclusions of Law.—Modification of Judgment.*—Where the judgment follows the conclusion of law, error, if any, is in the conclusion and not in the judgment, and the remedy is by excepting to the conclusion of law and not by moving to modify the judgment.
W. P. Nelson Co. v. Weyl, Rec., 674, 681 (1).
11. *Presenting Questions.—Correctness of Conclusions of Law.—Necessity of Taking Exceptions.*—Where no exceptions were taken below to the conclusions of law, no question as to their correctness is presented for review on appeal.
Beaven v. Hamilton, 141, 145 (3).
12. *Presenting Questions.—Rulings on Evidence.—Necessity of Taking Exceptions.*—Where no exceptions were taken to the action of the trial court in admitting or excluding evidence, no question relating thereto can be reviewed.
Beaven v. Hamilton, 141, 145 (4).
13. *Questions Reviewable.—Exclusion of Evidence.—Necessity of Offer to Prove.*—No error is shown in the refusal to allow a witness to answer a question in the absence of an offer of proof as to the testimony which would have been elicited.
Pittsburgh, etc., R. Co. v. Retz, 581, 586 (5).

IV. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

14. *Term Time.—Bond.—Sureties.—Approval After Term.*—Where the court, during the term in which final judgment is rendered, fails to approve either the appeal bond or surety, such failure cannot be cured by an approval made at a subsequent term.
(Penn., etc., Plate Glass Co. v. Poling [1913], 52 Ind. App. 492, 100 N. E. 83, and Ashley v. Henderson [1904], 32 Ind. App. 242, 69 N. E. 469, in part disapproved.)
Equitable Surety Co. v. Taylor, 382, 387 (5).
15. *Term Time.—Bond.—Approval.—Equivalent Methods.*—To perfect a term-time appeal, §679 Burns 1914, §638 R. S. 1881, requires that the bond be filed and approved at the term at which the appeal is granted, or else that the court fix the amount of bond

APPEAL—Continued.

and name and approve the sureties at such term and that the bond be filed in accordance therewith and within the time granted therefor by the court as shown by the record.

Equitable Surety Co. v. Taylor, 382, 385 (2).

16. *Term Time.—Failure to Perfect.—Vacation Appeal.*—Where a party has attempted to perfect a term-time appeal under §679 Burns 1914, §638 R. S. 1881, but has omitted some essential requirement, he will be deemed to have abandoned his appeal in term; but, if the transcript has been filed, with an appropriate assignment of errors, the appeal becomes a vacation appeal.

Kintz v. State, ex rel., 225, 227 (1).

17. *Vacation.—Notice of Appeal.—Waiver.*—The filing of a brief by appellee on the merits, or a joinder in error, waives notice of a vacation appeal.

Kintz v. State, ex rel., 225, 228 (3).

18. *Vacation.—Requisites.—Notice of Appeal.*—The notice of a vacation appeal required by §681 Burns 1914, §640 R. S. 1881, must be given, unless waived, where an abandoned term-time appeal is treated as a vacation appeal.

Kintz v. State, ex rel., 225, 228 (2).

19. *Vacation Appeals.—Submission.—Date.*—Under §693 Burns 1914, Acts 1885 p. 219, an appeal in vacation is submitted as of course at the expiration of thirty days from the date of service of notice on the appellee of the taking of the appeal, except (1) where otherwise ordered by the court, and (2) where the notice is waived and the appellee has entered a general appearance.

Winona Electric Light, etc., Co. v. Goshert, 548, 550 (1).

V. RECORD—PREPARATION AND CONTENTS.

See also 44, 56.

20. *Instructions.—Failure to Include Evidence in Record.*—Where the evidence is not in the record, none of the instructions given will be held erroneous if correct under any evidence admissible under the issues.

Oleske v. Piotrowski, 136, 141 (3).

21. *Instructions.—Burden of Showing Error Harmless.*—Where appellee contends that error, if any, in instructions challenged by appellant was invited by instructions tendered by appellant and refused, the burden is on her to show that fact by having such requested instructions brought into the record, it not being incumbent on appellant to include them in the record where they are not essential to a determination of the questions presented by appellant relating to the instructions given.

Indianapolis, etc., Traction Co. v. Senour, Adm., 10, 19 (14).

22. *Questions Presented.—Ruling on Motion for New Trial.—Failure to File Bill of Exceptions in Time Allowed.*—Where defendant's motion for a new trial was overruled and it failed to file its bill of exceptions in the time fixed by the court, no available error is presented by the motion for new trial.

Lake Co. Agri. Society v. Verplank, 186, 188 (1).

23. *Questions Reviewable.—Ruling on Motion for New Trial.—Failure to Incorporate Evidence in Record.*—Where each of the questions presented by the motion for a new trial requires a consideration of the evidence and it is not in the record, no question is presented relative to the ruling on the motion.

Loveland v. McCormick, 172, 175 (1).

24. *Refusal of Instructions.*—The court on appeal cannot determine whether the refusal of a requested instruction, which was

APPEAL—Continued.

a correct statement of law, was reversible error in the absence of the evidence from the record.

Pittsburgh, etc., R. Co. v. Retz, 581, 586 (6).

25. *Reversal.—Refusal of Change of Venue.*—Where the evidence is not in the record, the court on appeal cannot say whether substantial justice has been done, so that the cause must be reversed for error in refusing a change of venue.

Davidson v. Lemontree, 215, 216 (2).

26. *Term Time.—Bond.—Sureties.—Approval.—Record.*—Where an entry shows appeal granted, bond fixed and surety named "subject to the approval of the court," neither the bond nor surety is shown to have been approved.

Equitable Surety Co. v. Taylor, 362, 387 (6).

VI. ASSIGNMENT OF ERRORS.

See also 40, 42.

27. *Complaint.—Sufficiency.—Attack by.—Review.*—An assignment of error attacking for the first time the sufficiency of the complaint presents no question. *Miller v. Meadows*, 337, 341 (1).

28. *Constitutional Questions.*—An assignment of error that the statute upon which the complaint is based is unconstitutional, is not proper and presents no question.

Public Utilities Co. v. Reader, Adm., 485, 489 (2).

29. *Joint Assignment of Error.—Effect Under Statute.*—Under §4, Acts 1917 p. 523, §691d Burns' Supp. 1918, an assignment of error, joint as to three appellants, will be treated as separate as to each.

Manweiler v. Truman, 658, 660 (2).

30. *Motion for Judgment on Answers to Interrogatories.—Motion for New Trial.*—A ruling on a motion for judgment on the answers to interrogatories is not ground for new trial, but may be assigned independently as error on appeal.

Chesapeake, etc., R. Co. v. Perry, 506, 511 (6).

31. *Submission.—Appellant's Brief.—Rules.*—The rule requiring appellant's brief to be filed within sixty days after submission is strictly enforced by dismissal.

Winona Electric Light, etc., Co. v. Goshert, 548, 550 (3).

VII. BRIEFS.

See also 17, 31.

32. *Appellee's Failure to File.—Error Not Shown by Appellant.—Affirmance.*—Where appellant has not shown any *prima facie* error, the judgment will be affirmed, even though otherwise the cause would have been reversed for conduct of appellee in keeping the record from the files and his failure to file briefs.

Fort Wayne, etc., Traction Co. v. Ridenour, 263, 266 (3).

33. *Argument.*—An argument is not an indispensable part of a brief. *Commercial Union, etc., Co. v. Schumacker*, 526, 531 (1).

34. *Instructions.—Refusal.—Failure to Include in Brief.*—An instruction objected to as erroneous, but not set out in appellant's brief, will not be considered on appeal.

Campbell v. Carroll, 587, 591 (4).

35. *Instructions.—Presumptions.*—Where appellant by his brief fails to set out in his statement of the evidence written instruments upon whose contents depends the correctness of rulings refusing and giving instructions, no error is shown, as the presumption is that the action of the court was correct.

Grand Trunk, etc., Railroad v. Glinski, 397, 399 (3).

APPEAL—Continued.

36. *Instructions.—Review.*—The Appellate Court is not required to consider alleged errors in refusing instructions on which no proposition or point is stated in the brief.
Chesapeake, etc., R. Co. v. Perry, 506, 511 (2).
37. *Omissions.—Reply Brief.*—A reply brief filed more than sixty days after submission cannot perform the office of a supplemental brief nor supply omissions in the original brief.
Hammond, etc., R. Co. v. Kasper, 328, 329 (1).
38. *Oral Argument.—Failure by Appellee.*—Failure by appellee to file any brief or to appear at oral argument may amount to a confession of error that will justify a reversal.
Peter Hand Brewing Co. v. Stamper, 351.
39. *Presenting Questions for Review.—Instructions.—Setting Out.*—It is not necessary that the brief of appellant should contain all of the instructions given in order to have the action of the court in giving and refusing certain instructions considered.
Modern Woodmen v. Stone, 601, 606 (2).
40. *Points.—Propositions.*—Assignments of error unsupported by propositions or points are waived.
Public Utilities Co. v. Reader, Admr., 485, 488 (1).
41. *Points and Authorities.—Waiver of Alleged Error.*—Alleged errors not contained under appellant's "Points and Authorities" are waived.
Brackney v. Boyd, 592, 597 (1).
42. *Points and Authorities.*—An assignment of error not mentioned or discussed in that section of appellant's brief devoted to points and authorities, is waived.
Miller v. Meadows, 337, 341 (2).
43. *Points and Authorities.—Abstract Propositions of Law.*—The bare statement of an abstract proposition of law in a brief under the heading "Points and Authorities," without any attempt to apply it to the issues or evidence, is not sufficient to present any question for consideration.
Kinnison v. Rarick, 455.
44. *Questions Presented.*—Where the overruling of the motion for a new trial was the only error assigned that appellant undertakes to present, discussing thereunder alleged errors in admitting certain evidence, but neither the motion nor the substance thereof is set out in his brief, and it does not appear from the brief that any bill of exceptions containing the evidence was ever filed and made part of this record, no question is presented for review on appeal.
Sturgeon v. Lopshtre, 191.
45. *Questions Presented.—Rulings on Evidence.*—Where appellant's brief fails to show that any exceptions were reserved to the rulings of the trial court with reference to the admission and rejection of evidence, no question in that regard is presented for the determination of the court on appeal.
Aldridge v. Clasmeyer, 43, 56 (10).
46. *Recital of Evidence.—Presumptions.*—Under Rule 22, governing the preparation of briefs, the condensed recital of the evidence contained in appellant's brief will be taken as accurate and sufficient for a full understanding of the questions presented for decision unless appellee has made the necessary corrections or additions.
Spahr, Admr., v. Polcar, 523, 524 (1).
47. *Sufficiency.—Review.*—Where appellant's brief makes no showing that time was fixed for filing his bill of exceptions containing the evidence, nor that the bill was ever filed, and where his points

APPEAL—Continued.

and authorities are mere abstract propositions of law not referring to any error to which they should be applied nor to any page and line of the brief where errors may be found, and where substantial omissions are made in the statement of the evidence, such brief is not sufficient to require an examination of the evidence.
Lieberman v. E. C. DeWitt & Co., 326.

48. *Sufficiency.—Rules of Court.*—Where appellant in the preparation of its brief has failed to some extent to comply with Rule 22 of the Supreme and Appellate Courts requiring an appellant to state, under a separate heading of each error relied on, separately numbered propositions or points, the court on appeal will not refuse to review the case, but will limit its consideration to such propositions or points as are properly stated and to those which, by their wording, clearly indicate the particular error to which they are directed.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 14 (1).

49. *Sufficiency.—Rules of Court.*—Where appellant's brief states a number of abstract propositions of law without any specific application of the same, the brief fails to comply with the rules of court governing the preparation of briefs.

Aldridge v. Clasmeyer, 43, 53 (4).

50. *Time of Filing.—Motion for Reversal.—Discretionary Power.*—Since the failure of appellee to file a brief within the time provided by the rules does not compel a reversal, but only calls for an exercise of the discretionary power of the court in cases where appellant's brief shows reversible error, a motion for a reversal for such failure will be overruled where appellee later files his brief upon leave granted by the court.

Commercial Union, etc., Co. v. Schumacher, 526, 531 (2).

51. *Waiver of Error.*—Error in overruling a demurrer to paragraphs of answer is waived by appellants' failure to make any point or state propositions in support thereof in their brief.

Loveland v. McCormick, 172, 175 (4).

52. *Waiver of Error.*—Assigned errors are waived by a failure of appellants to make any specific reference thereto in the propositions or points in their brief.

Aldridge v. Clasmeyer, 43, 57 (12).

53. *Waiver of Error.—Statement of Evidence.—Sufficiency.*—Where, though a large number of witnesses testified, appellant merely set out in its brief its conclusion of what the evidence showed together with only a part of the testimony of one witness, there was not a sufficient compliance with Rule 22, cl. 5, of the Appellate Court, requiring a condensed recital of the evidence in narrative form, and all questions depending on the evidence are waived.

Pittsburgh, etc., R. Co. v. Retz, 581, 585 (2).

54. *Appellant's Recital of Evidence.—Appellee's Failure to Challenge.—Effect.*—Where appellee makes no objection to appellant's recital of the evidence, the court on appeal will accept such recital as correct.

Federal Life Ins. Co. v. Barnett, Adms., 613, 637 (14).

VIII. DISMISSAL.

See also 31; MASTER AND SERVANT 14.

55. *Perfecting.—Jurisdiction.—Joinder in Error.*—Where an ineffectual attempt has been made to perfect a term-time appeal and

APPEAL—Continued.

no effort has been made to perfect the same as a vacation appeal, and appellees have not joined in error, a motion to dismiss for want of jurisdiction will be sustained.

Equitable Surety Co. v. Taylor, 382, 389 (7).

56. *Record.—Failure to Present Questions.*—Where the errors assigned on appeal are the sustaining of the demurrer to a plea in abatement and the overruling of the motion for a new trial, and the brief fails to show that appellant reserved any exception to any ruling or action of the trial court, the complaint is not set out in the brief, no showing is made as to when the judgment was rendered or when the motion for a new trial was ruled on, if at all, neither the instructions nor the evidence is in the record, though error was predicated on the refusal of instructions and the sufficiency of the evidence challenged, and there is no condensed statement of the evidence in narrative form in appellant's brief, as required by Rule 22 of the Appellate Court, no question is presented for review on appeal and appellee's motion to dismiss will be sustained.

Fort Wayne Mercantile, etc., Assn. v. Scott, 266, 268 (1).

57. *Vacation Appeal.—Failure to Perfect.*—Where, in an attempted vacation appeal from a judgment in favor of a foreign corporation, notice of the appeal was served only on the keeper of a livery stable in which a horse and wagon belonging to appellee were kept, though appellee had filed with the secretary of state its certificate appointing an agent for service of process, and the steps required by the statute to perfect a vacation appeal, where no statutory notice is given below, not having been taken, the court on appeal is without jurisdiction over appellee and its motion to dismiss must be sustained.

Roe v. Jewel Tea Co., 170.

IX. PROCEEDINGS PRELIMINARY TO HEARING.

58. *Submission.—Notice by Clerk to Attorneys.—Rules.*—Rule 18 of the Supreme Court, by implication makes it the duty of the clerk to enter an order of submission at the expiration of thirty days after service of notice on the appellee in every civil cause which does not come within either exception contained in §693 Burns 1914, Acts 1885 p. 219, and to mail a notice of such submission to at least one of the attorneys whose names are appended to the assignment of errors, but the mailing of the notice satisfies that duty.

Winona Electric Light, etc., Co. v. Goshert, 548, 550 (2).

X. HEARING AND REHEARING.

59. *Motion to Reinstate Appeal.—Time for Filing.*—Where the time allowed by §704 Burns 1914, §662 R. S. 1881, for filing a petition for rehearing has expired and the opinion and a judgment of dismissal have been certified to the trial court, the appellate court has lost its jurisdiction and has no power to entertain a motion to reinstate the appeal.

Fort Wayne Mercantile, etc., Assn. v. Scott, 266, 269 (2).

60. *Petition for Rehearing.—Time for Filing.—Statute.*—A petition for rehearing must be filed within the sixty days fixed by §704 Burns 1914, §662 R. S. 1881, and the court has no power to extend the time so fixed.

Fort Wayne Mercantile, etc., Assn. v. Scott, 266, 269 (3).

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XI. REVIEW.

(A) SCOPE AND EXTENT.

61. *Demurrer.—Statutory Provisions.*—The Appellate Court is not by §344 Burns 1914, Acts 1911 p. 415, limited to the specifications set out in the memoranda, when reviewing rulings sustaining demurrers to the complaint and to the answer to the cross-complaint. *Wagner v. Treesh*, 551, 554 (1).
62. *Instruction.—Evidence.—Burden on Appeal.*—When an appellant claims that an instruction should have been given, it has the burden of showing that it is applicable to the evidence. *Grand Trunk, etc., Railroad v. Glinski*, 397, 399 (2).
63. *Ruling on Demurrer.—Failure to Set Out Memorandum to Demurrer.*—The court on appeal cannot review the action of the trial court in overruling a demurrer to a plea in abatement where no memorandum to the demurrer is set out. *Ransburg v. U. S. Fidelity, etc., Co.*, 304, 305 (1).

(B) PARTIES ENTITLED TO ALLEGE ERROR.

64. *Instructions.—Invited Error.*—A party has no right to complain of an instruction given where he requested an instruction which embodied the same legal principle. *Indianapolis, etc., Traction Co. v. Senour, Adms.*, 10, 19 (12).
65. *Pleading.—Admission by Demurrer.—Judgment on Failure to Plead.—Review.*—The judgment must be affirmed if either paragraph of the complaint states a cause of action, where the defendant has demurred to each paragraph and has elected to abide the ruling of the court thereon and refused to plead further, since by the demurrer he admits the facts well pleaded. *Christlieb v. Christlieb*, 682, 684 (1).
66. *Right of Review.—Objections in Court Below.—Coappellee's Motion for New Trial.*—Where three defendants appealed, one of them who filed no motion for new trial is in no position to complain of the ruling on the motion made by the other two defendants, and, no other error being assigned, the judgment must for that reason be affirmed as to him. *Manweiler v. Truman*, 658, 659 (1).

(C) PRESUMPTIONS.

See also 35, 46; JUDGMENTS 4; SUBMISSION OF CONTROVERSY 2.

67. *Amendment to Complaint.*—Where the record on appeal shows that appellant objected to the amendment of the complaint, but made no application for a continuance, offered no additional evidence, and made no showing that it was in any way prejudiced thereby, the court on appeal will presume that the amendment was authorized in the furtherance of justice under §§400, 405 Burns 1914, §§391, 396 R. S. 1881. *C. H. Maloney & Co. v. Whitney*, 157, 159 (1).
68. *Application for Relief from Judgment by Default.—Evidence.—Review.*—The same presumptions will be indulged in on appeal in favor of the correctness of a decision in a proceeding to set aside a default on the ground of excusable neglect as in other appeals, and the appellate tribunal will not weight the evidence. *Hartford Fire Ins. Co. v. Applebaum*, 514, 517 (3).
69. *Error.—Exclusion of Evidence.—Not Shown Harmless.*—Where, from the record, the Appellate Court is unable to say that an error was harmless in excluding evidence which related to a

APPEAL—Continued.

material issuable fact, found against the complaining party, such error is presumed to have been harmful.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 441 (12).

70. *Instructions.—Briefs.*—Where it does not appear from appellant's brief to the contrary, it will be presumed that the court withdrew or corrected any erroneous instructions therein shown to have been given, and that the court covered such instructions as are therein shown to have been refused and upon which appellant predicates error.

Hammond, etc., R. Co. v. Kasper, 328, 330 (2).

71. *Instructions.—Invited Error.*—The court on appeal, in considering alleged error in instructions given, will not presume, in the absence from the record of instructions tendered by appellant and refused, that any error committed by the court in instructing the jury was invited by instructions requested by appellant.

Indianapolis, etc., Traction Co. v. Senour, Admrs., 10, 19 (13).

72. *Refusal of Instructions.*—The trial court's refusal of requested instructions is not reversible error where such instructions are fully covered by others given by the court on its own motion.

Haskell, etc., Car Co. v. Logerman, Admrs., 69, 77 (10).

73. *Replevin.—Failure to Find Value of Property.*—In an action in replevin, where the jury found that defendant was not entitled to the property in controversy, the jury's failure to find the value of the property was harmless to defendant, and it cannot complain.

Mecker Hotel Co. v. Forgan, 199, 201 (1).

(D) DISCRETION OF TRIAL COURT.

74. *Permitting Amendments to Pleadings.*—It is only where the trial court has abused its discretion in allowing amendments to pleadings that a cause will be reversed by reason thereof.

C. H. Maloney & Co. v. Whitney, 157, 160 (3).

75. *Ruling on Motion to Make Complaint More Specific.*—The granting or refusing of a motion to make the complaint more specific is not wholly within the discretion of the trial court, but, unless it clearly appears that the complaining party has suffered by the court's refusal to sustain such a motion, the cause will not be reversed. *Lake Co. Agrl. Society v. Verplank*, 186, 188 (2).

(E) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

76. *Conflicting Evidence.*—The court on appeal will not weigh conflicting evidence.

McCool v. Mickler, 190.

77. *Conflicting Evidence.—Damages.*—Where in an action for personal injuries there is conflicting evidence as to whether plaintiff was ruptured by falling at the time complained of or had previously been ruptured, the question is one for the jury.

City of New Albany v. Stallings, 232, 237 (6).

78. *Conflicting Evidence.—Negligence.—Highways.*—Where there is evidence to support the verdict, and a sharp conflict as to which of the two drivers of colliding automobiles was guilty of negligence causing the collision, the evidence will not be weighed on appeal.

Steckbeck v. Worman, 666, 667 (1).

79. *Conflicting Evidence.—Review.*—A verdict rendered upon conflicting evidence finally determines the issues of fact involved.

Arthur v. Stulls, 451, 453 (2).

80. *Evidence.—Conflict.*—Where all questions involved in an appeal require a review of conflicting evidence, the judgment of the trial court is conclusive.

Wirtz v. Bird, 662.

APPEAL—Continued.

81. *Evidence.—Conflict.*—Where the only questions presented under the rules of the Appellate Court require for determination a review of conflicting evidence, the judgment of the trial court is conclusive and will be affirmed. *Gray v. Wiscaver*, 290.
82. *Evidence.—Conflict.*—A finding based on contradictory evidence will not be disturbed on appeal. *Opel v. Wetsheit*, 311, 313 (2).
83. *Evidence.—Fraud.*—Whether certain false representations were known to be such by their makers, and whether they acted in good or bad faith in making them, being questions of fact for the jury in an action founded thereon, the verdict must stand if there be any evidence to support it, and the Appellate Court will not weigh the evidence in view of the superior opportunities for observation enjoyed by the trial court and jury. *Mamoceller v. Truman*, 658, 660 (3).
84. *Evidence.*—Where there is evidence to support the material elements of the verdict, the Appellate Court will not weigh the evidence. *Massachusetts Bonding, etc., Co. v. Free*, 275, 278 (5).
85. *Evidence.*—It is not the province of the Appellate Court to weigh the evidence when it was sufficient to justify the submission of the cause to the jury. *Public Utilities Co. v. Reader, Adms.*, 485, 495 (6).
86. *Evidence.—Negligence.—Contributory Negligence.*—In an action involving negligence and contributory negligence where under the evidence they are both questions for the jury and where there is evidence to support the verdict, it cannot be disturbed on appeal. *City of New Albany v. Stallings*, 232, 237 (5).
87. *Evidence.—Sufficiency.*—Where there is some evidence to sustain the verdict, its weight and sufficiency is for the jury, and its finding thereon is conclusive on appeal. *Arthur v. Farmers, etc., Ins. Co.*, 135.
88. *Evidence.—Sufficiency.*—The decision of the trial court cannot be disturbed where the evidence fairly tends to support it. *Prinz v. Grayson*, 375, 376 (1).
89. *Findings.—Evidence.—Sufficiency.*—In determining whether the finding of facts is sustained by sufficient evidence, the court on appeal must not only consider the direct evidence most favorable to appellee, but also all reasonable inferences that the trial court was warranted in drawing therefrom, and this is true, although other and contrary inferences may be reasonably drawn from such evidence. *Aldridge v. Clasmeyer*, 43, 56 (9).
90. *Findings.—Conflicting Evidence.*—The court on appeal will not disturb the findings of the trial court where the evidence is conflicting, unless the decision is contrary to law. *King v. Hartley*, 1, 5 (1).
91. *Findings.—Conclusiveness.*—In an action to cancel a note alleged to have been procured by fraud, the trial court's finding, based upon sufficient evidence on the issue of fraud, is conclusive on appeal. *Citizens Nat. Bank v. Gillett*, 155, 157 (2).
92. *Findings.—Failure to Challenge.—Admissions.*—Failure to challenge the correctness of facts as found is an admission that the finding is correct and supported by the evidence. *Pfafflin v. Schmidt, Admr.*, 496, 504 (1).
93. *Findings.—Sole Fact in Issue.—Witnesses Before Judge.—Review.*—Where the trial judge saw and heard the witnesses, the

APPEAL—Continued.

Appellate Court will not overthrow a finding as to the sole fact in issue if there is any evidence to support it.

Barner v. International, etc., Union, 260, 262 (2).

94. *Verdict.—Conclusiveness.—Conflicting Evidence.*—The determination of the jury based on conflicting evidence is conclusive on appeal.

Indianapolis, etc., Traction Co. v. Senour, Admr., 10, 18 (8).

95. *Verdict.—Conclusiveness.—Conflicting Evidence.*—A judgment based on conflicting evidence is conclusive on appeal.

Born v. King, 154.

96. *Verdict.—Conclusiveness.—Evidence.—Sufficiency.*—In a common-law action, where the parties had a constitutional right to a trial by jury, it is not within the power of the court on appeal to overturn a verdict which rests upon some evidence and is not contrary to law.

Belt R. & Stock Yards Co. v. Hammond, 151, 154 (3).

(F) HARMLESS ERROR.

97. *Absence of Party.—Continuance.—Denial.*—Error, if any, in denying a continuance to a party prayed for on the ground of inability to attend the trial on account of sickness, is harmless where the party appears and testifies on the second day of the trial and three of her witnesses appear the same day, though two of her witnesses had been examined the day previous, where it does not appear that her cause suffered because of her absence.

Ruddick v. Hollowell, 442.

98. *Admission of Evidence.—Railroads.—Crossing Accidents.*—In an action for damages to a separator struck by a train while stalled at a crossing, defendant could not be harmed by permitting plaintiff to show the amount of travel on the road involved.

New York Central R. Co. v. Reidenbach, 390, 396 (8).

99. *Admission of Evidence.*—Error, if any, in the admission of evidence was harmless, where it affirmatively appeared that the court ignored such evidence.

Donner v. Griffith, 693, 699 (6).

100. *Admission of Evidence.*—Where, in an action on an accident policy, a declaration by the insured as to the cause of his injury, was erroneously admitted in the testimony of plaintiff, his widow, the error is harmless where she later answered a similar question to the same effect without objection, and where other evidence was introduced without objection to the same effect.

Massachusetts Bonding, etc., Co. v. Free, 275, 280 (10).

101. *Evidence.—Exclusion.—Contracts.*—Where a verdict was properly directed in an action for breach of contract, on the ground that the evidence showed that no such contract had been entered into, errors, if any, against the plaintiff, in excluding offered testimony, became harmless.

Shane Bros. v. Barrett, 331, 332 (2).

102. *Exclusion of Evidence.*—Where plaintiff would not have been entitled to a recovery in any event, exclusion of evidence offered by her was harmless.

Martin v. Seibert, Admr., 564, 566 (3).

103. *Failure to Make Immaterial Finding.*—The failure of the trial court to make a finding which would not affect the correctness of the conclusion of law stated cannot be made the basis of reversible error.

State, ex rel. v. Allen, 160, 169 (6).

APPEAL—Continued.

104. *Failure to Make Unnecessary Findings.*—In an action by a commissioner in charge of the construction of a drainage ditch to recover on an injunction bond his expenses of litigation incurred in defending a suit by landowners to restrain collection of assessments, in which he intervened, the court's failure to find the amounts allowed and paid out by him as such expenses was harmless, since, being an unnecessary and an improper party to the owners' action under §6144 Burns 1914, Acts 1907 p. 508, he was not entitled to recover such expenses.

State, ex rel. v. Allen, 160, 168 (3).

105. *Misconduct of Counsel.*—In an action for personal injuries, statements by plaintiff's counsel, in his argument to the jury, that plaintiff should not be given a low verdict, less than he was entitled to, with the idea that defendant would not appeal, as the case would be appealed anyhow, whatever the verdict might be, were improper, and it was error for the trial court to overrule an objection thereto, but, as the effect of such statements was to increase the amount of damages assessed, and appellant, although specifying excessive damages as a ground for new trial, failed to present that question in his brief, indicating that it had no objection to the amount of the award, the error will be deemed harmless.

Cleveland, etc., R. Co. v. Locke, 35, 40 (3).

106. *Motion to Make More Specific.*—Where the averments of plaintiff's injuries were such that the motion to make them more specific might properly have been in part sustained, but where from the whole record it is apparent that no rights of the defendant were prejudiced thereby, the overruling of the motion is not reversible error.

Louisville, etc., Traction Co. v. Cotner, 377, 378 (1).

107. *Overruling Demurrer to Reply.*—Where the special finding of facts shows that the judgment is not based on a certain paragraph of reply, the action of the court in overruling a demurrer to such paragraph was harmless.

Beaven v. Hamilton, 141, 144 (2).

108. *Overruling Demurrer.*—Error, if any, in overruling demurrer to a reply seeking to estop defendants from asserting that the wife was a surety on the notes in suit is harmless, the court having determined that the wife was in fact a principal.

Aldridge v. Clasmeyer, 43, 53 (3).

109. *Overruling Demurrer.*—In an action to enjoin the obstruction by an adjoining landowner of a strip of land claimed to be a public highway between his building and plaintiff's property, error, if any, in overruling a demurrer to a paragraph of complaint, demurred to on the ground that it constituted an attempt to vary or contradict the terms of a deed, was harmless, where the cause was decided on another paragraph of complaint which was based on the theory that the strip in dispute became a public highway by user.

Donner v. Griffith, 693, 696 (1).

110. *Refusal of Instructions.*—The refusal of tendered instructions relating to issues not involved in the cause was harmless.

Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 150 (5).

XII. DETERMINATION AND DISPOSITION OF CAUSE.

111. *Affirmance.—Correct Determination of Cause.—Erroneous Ruling on Demurrer.*—Where upon the whole record the court on appeal is satisfied that a fair trial was had and a correct result

APPEAL—Continued.

reached, the cause will not be reversed because of error in overruling a demurrer or a motion to make more specific.

Federal Life Ins. Co. v. Barnett, Adma., 613, 636 (12).

112. *Affirmance.—Disposition of Cause.—Death of Appellee.*—

Where the death of appellee after submission of the cause is suggested in the record, affirmance of the cause will be as of the date of submission.

Travelers Protective Assn. v. Brazington, 130, 135 (2).

113. *Reversal.—Error.—Harmlessness Not Apparent.*—Where, after a careful examination of the entire record, the Appellate Court is unable to say that the correct result was reached, or that the errors noted in instructions given were harmless, a reversal will follow.

Louisville, etc., Traction Co. v. Cotner, 377, 382 (8).

114. *Reversal.—Judgment.—Item of Recovery Erroneously Allowed.*

—In an action against a garage keeper to replevin a motor truck left in his possession by a conditional vendee wherein defendant by cross-complaint set up a statutory lien for repairs, storage and supplies, including gasoline furnished at the request of such vendee, in the absence of any evidence showing that the conditional vendee had any authority, either express or implied, from the vendor to purchase gasoline, judgment for defendant on his cross-complaint must be reversed, regardless of his right to a lien for the other items claimed, where there was no evidence of the amount and value of the gasoline so purchased.

Partlow, etc., Car Co. v. Stratton, 122, 128 (3).

XIII. LIABILITY ON BONDS.

115. *Affirmance as to Coappellant.*—In a term-time appeal by three defendants, where the judgment must be affirmed against one, there is a liability on the appeal bond therefor, even though there were reversible error as to the other two defendants.

Manweiler v. Truman, 658, 662 (5).

APPEARANCE—

By foreign insurance company, failure to deny execution of policy, effect, see JUDGMENT 7.

APPRAISAL—

Of fire loss, rights of parties, see INSURANCE 5-7, 9, 10.

ARBITRATION AND AWARD—

1. *Action on Award.—Admissibility of Award.*—In an action on an award, the award is admissible in evidence.

Milhollin v. Milhollin, 477, 484 (4).

2. *Dispute.—Sufficiency.*—It is not ground for objection to an award that the arbitration is comprised wholly of matters adjudicated by the final settlements in certain estates, since a legal cause of action is not necessary to authorize a submission, a dispute, controversy, or honest difference of opinion, either as to liability or amount, being sufficient.

Milhollin v. Milhollin, 477, 480 (1).

3. *Facts of Arbitration.—Evidence.—Admissibility.*—In an action on an award, testimony by arbitrator of what was said and done at the hearing of the amount of his charges, held unobjectionable.

Milhollin v. Milhollin, 477, 484 (5).

ARGUMENT—

Necessity of, as part of brief, see **APPEAL 33**.

ASSAULT AND BATTERY—

On passenger, action, complaint, verdict, see **CARRIERS 9, 10**.

On passenger, evidence, admissibility, see **TRIAL 1**.

Wilfulness.—Evidence.—Sufficiency.—In an action for damages for assault and battery, the evidence is not insufficient to sustain a verdict for plaintiff because not showing that the assault and battery was wilfully committed, since there could not be an assault and battery without its being wilfully committed.

Fort Wayne, etc., Traction Co. v. Ridenour, 263, 265 (1).

ASSESSMENTS—

See **DRAINS; INJUNCTION 2-4; MUNICIPAL CORPORATIONS 1**.

ASSIGNMENT OF ERRORS—

See **APPEAL 27-31**.

ASSISTANCE, WRIT OF—

See also **MORTGAGES**.

When Available.—Settled Law.—Resort may be made to the writ of assistance when the right to possession is clear and without *bona fide* question by reason of the settled law of the state.

Brackney v. Boyd, 592, 597 (3).

ATTORNEY AND CLIENT—

Attorney's Fees.—Recovery.—Complaint.—Theory.—Sufficiency.—In an action by attorneys against a county clerk to recover fees for services for securing a judgment which was paid to the sheriff and turned over to the clerk, complaint held to be drawn on the theory of enforcing plaintiff's rights as holders of a statutory lien, so that its sufficiency must be determined regardless of any right plaintiffs may have had to demand and receive the money from the clerk for their client under §1009 Burns 1914, §968 R. S. 1881.

State, ex rel. v. Bleeke, 23, 27 (3).

AUTOMOBILES—

Negligent operation, parties responsible, see **NEGLIGENCE 1**.

Passive guest, not chargeable with contributory negligence, see **RAILROADS 5**.

AWARD—

See **ARBITRATION AND AWARD**.

Of compensation, see **MASTER AND SERVANT**.

BANKS AND BANKING—

See also **BILLS AND NOTES; JUDGMENT 2**.

Payment of Note by Maker.—Failure to Apply to Note.—Insolvency of Bank.—Maker's Rights as Preferred Creditor.—Where the maker of a note payable to a bank went to the bank to pay the same, and an officer of the bank, fraudulently concealing the fact that the note had been assigned to secure a loan, accepted the money and informed the maker that it would be applied to the payment of the note, the money so received did not belong to the bank or its creditors, and such maker was entitled to have his judgment against the bank for such money paid as a preferred claim.

State, ex rel. v. Farmers, etc., Bank, 216, 221 (1).

BASTARDS—

See WITNESSES.

1. *Acknowledgment.—Evidence of Denial.—Competency and Scope.*
—In an action to quiet title to a decedent's real estate, evidence of deceased's denials that he was the father of claimant, a bastard, along with other declarations and acts in relation to the paternity of claimant, was competent for determining whether there was an acknowledgment, but not for the purpose of defeating an acknowledgment once actually made, and it was reversible error to exclude it. *Campbell v. Carroll*, 587, 589 (1).
2. *Acknowledgment.—Requisites.—Certainty and Definiteness.—Record Showing Compromise of Bastardy Proceeding.—Competency.*—Acknowledgment of the paternity of a bastard child must be definite, certain and unequivocal, and in an action involving the right of a bastard to inherit deceased's property, the record of a bastardy proceeding against deceased, which was compromised, containing no admission of paternity, was inadmissible in evidence. *Campbell v. Carroll*, 587, 590 (2).
3. *Actions.—Admonitory Instructions.—Discretion of Trial Court.*
—In a bastardy proceeding, it was within the discretion of the trial court to refuse a requested admonitory instruction that each juror must be convinced by a preponderance of the evidence that defendant was the father of relatrix's child, and should not consent to a verdict unless so convinced.
Kintz v. State, ex rel., 225, 231 (10).
4. *Actions.—Instructions as to Opportunity.*—In a bastardy proceeding, it is proper to instruct the jury on the question of opportunity for sexual intercourse.
Kintz v. State, ex rel., 225, 229 (5).
5. *Actions.—Instructions as to Opportunity.*—In a bastardy proceedings, an instruction that, in determining whether the parties had sexual intercourse, the jury might consider their opportunities for so doing, and certain facts recited, in ascertaining whether such opportunity existed, when taken in connection with an instruction that a preponderance of the evidence was all that was necessary to establish the case against defendant, *held* not to authorize a recovery on a preponderance of evidence as to opportunity, in view of other instructions stating what facts must be proved before plaintiff could recover.
Kintz v. State, ex rel., 225, 228, 229 (4).
6. *Actions.—Incomplete Instruction.—Cure by Other Instructions.*
—In a bastardy proceeding, an instruction that a preponderance of the evidence was sufficient to establish the case, *held* not erroneous because failing to state that all the material allegations of the complaint must be proved by such preponderance, in view of other instructions given.
Kintz v. State, ex rel., 225, 229, 230 (6).
7. *Actions.—Degree of Proof Required.*—Prosecutions for bastardy are civil actions, and a preponderance of the evidence is sufficient to establish the affirmative of any issue.
Kintz v. State, ex rel., 225, 230 (7).
8. *Actions.—Instructions.—Credibility of Relatrix.*—In a bastardy proceeding, a requested instruction that, in determining what weight should be given the testimony of the relatrix, the jury might consider the fact that by her own testimony she showed immorality and want of chastity, was properly refused, where the only immorality and want of chastity so shown was that involved

BASTARDS—Continued.

in her relations with defendant about the time she claimed the child was begotten, which was about two years before the trial, since, while it would have been proper for the jury to consider such want of chastity in determining the moral character of the relatrix at the time she testified, as affecting her credibility as a witness, the instruction might have improperly led the jury to believe that it was conclusive as to her character at the time of trial.
Kintz v. State, ex rel., 225, 230 (8).

BENEFICIAL ASSOCIATIONS—

Death Benefits.—Dependency.—In an action to recover death benefits under the by-laws of a union, by one claiming to have been dependent in whole or in part upon the deceased member, dependency is a question of fact and not of law.
Barner v. International, etc., Union, 260, 262 (1).

BENEFITS—

Action for, dependency, jury question, see **BENEFICIAL ASSOCIATIONS**.

BILLS AND NOTES—

See also **BANKS AND BANKING**; **HUSBAND AND WIFE** 8, 9.

Promissory Note.—Voluntary Execution Without Consideration.—Maker's Right to Equitable Relief.—In the absence of fraud or mistake, one voluntarily executing a promissory note without consideration cannot ask a court of equity to cancel the same.
Citizens Nat. Bank v. Gillett, 155, 157 (1).

BOARD—

Lien on goods of guests, see **INNKEEPERS**.

BONDS—

Action on fidelity bond, parties, see **PRINCIPAL AND SURETY** 1.

Appeal, liability, see **APPEAL** 115.

Approval, time, sufficiency, see **APPEAL** 14, 15, 26.

Official, breach of duty, liability, see **OFFICERS** 4.

Of liquor dealer, action, waiver of defect of parties, see **PARTIES**.

Reformation, action, parties, see **REFORMATION OF INSTRUMENTS**.

BOUNDARIES—

See also **ADVERSE POSSESSION**.

1. *Adverse Possession.—Husband and Wife.—Acquiescence.*—In an action by the wife after divorce, to quiet title to part of an adjoining tract owned by the husband, the fact that for more than twenty years he had acquiesced in the location of a fence, which included part of his land with the wife's property, does not establish the fence as the real boundary line, where husband and wife occupied both tracts jointly, since a contrary claim is in reality a claim by adverse possession.

Burcham v. Roach, 669, 674 (4).

2. *City Lots.—Streets and Alleys.—Dedication.—Title.*—A conveyance of a lot in a town or city designated by its number or other proper description, and abutting on a street or alley, carries with it in general the fee to the center of the street, and where the street or highway has been wholly made from and upon the margin of the grantor's land, such a conveyance will carry with it the fee to the whole of the street dedicated.

Brackney v. Boyd, 592, 597, 600 (4).

BOUNDARIES—Continued.

3. *City Lots.—Mortgage Foreclosure.—Sheriff's Deed.*—The rule that a conveyance of a town or city lot carries a fee in the street adjoining is applicable to mortgages and deeds made by the sheriff upon foreclosure of mortgage.

Brackney v. Boyd, 592, 598 (5).

BRIEFS—

See **APPEAL** 32-54.

BURDEN OF PROOF—

See **EVIDENCE**.

CANCELLATION—

Of note, relief in equity, see **BILLS AND NOTES**.

CARE—

Required of railway company to drive along tracks, see **STREET RAILROADS** 9, 10.

CARRIERS—

See also **RAILROADS**; **TRIAL** 14, 15, 17.

1. *Carriage of Freight.—Schedule of Rates.—Notice.—Statute.*—A schedule of freight rates filed with the Public Service Commission, as required by §5540 Burns 1914, Acts 1911 p. 545, is binding both on the carrier and the shipper, and both are chargeable with notice thereof.

Cleveland, etc., R. Co. v. Alexandria Paper Co., 119, 121 (1).

2. *Carriage of Freight.—Mistake in Rates.—Action for Balance.—Statute.*—In view of §5540 *et seq.* Burns 1914, Acts 1911 p. 545, providing for uniform freight rates and requiring a schedule thereof to be filed with the Public Service Commission, where the rate for transporting coal, as filed with the commission, was sixty-five cents per ton, but the carriers' agent through mistake collected only sixty cents, it was not only the carrier's right, but also its duty to collect the difference between the amount charged by the agent and the rate filed.

Cleveland, etc., R. Co. v. Alexandria Paper Co., 119, 121 (2).

3. *Carriage of Freight.—Evidence of Delivery.—Question of Fact.*—Where the plaintiff in an action for negligent loss of goods rode in the car with his goods and horses to destination, and there signed the bill of lading and accepted the expense bill, and unloaded his horses, wagon and harness, leaving the lost goods in the car on the unloading track, and where the evidence is conflicting as to whether anything was said between him and the agent of the carrier on the subject of leaving the balance of the property in the care of the company, the question as to whether the property had been delivered to plaintiff was a question of fact for the jury.

Grand Trunk, etc., Railroad v. Glinksi, 397, 400 (5).

4. *Delay.—Special Duties of Carrier.*—It is the duty of a carrier to exercise reasonable care to protect property from loss or injury during extraordinary delay in transportation, and to give the consignor or owner notice of such delay.

Pittsburgh, etc., R. Co. v. Daniels, etc., Co., 518, 520 (1).

5. *Delay.—Action for Failure to Preserve Property.—Evidence.—Sufficiency.*—In an action for damages to a carload of shelled corn, evidence held sufficient to sustain verdict for plaintiff on

CARRIERS—Continued.

the theory of defendant's lack of care in giving the corn proper care and attention and in failing to notify plaintiff of the delay caused by an embargo, as a result of which a connecting line had the corn on its tracks forty days.

Pittsburgh, etc., R. Co. v. Daniels, etc., Co., 518, 520 (2).

6. *Carriage of Live Stock.—Failure to Unload Promptly.—Action.—Jury Questions.—Negligence.—Contributory Negligence.*—In an action against a carrier of live stock for the loss of hogs alleged to have resulted from defendant's negligent failure to promptly unload them, *held* that, in view of the record, the question of the carrier's negligence, as well as the shipper's contributory negligence in overloading the cars, was for the jury.

Belt R. & Stock Yards Co. v. Hammond, 151, 152, 153 (1).

7. *Carriage of Live Stock.—Negligence.—Failure to Unload Promptly.*—It is the duty of a carrier accepting live stock for shipment to unload the same at the point of destination with reasonable promptness, in view of surrounding conditions, and failure to do so is negligence.

Belt R. & Stock Yards Co. v. Hammond, 151, 153 (2).

8. *Carriage of Passengers.—Actions.—Defenses.—Last Clear Chance.*—One who, knowing the east to be the proper side therefor, attempts to board the west side of a moving northbound car arranged with railing to prevent boarding on that side, and at a place away from a regular stopping place, and knowing that there were double tracks there and northwardly whereon a southbound car might be met at any time, negligently and knowingly placed himself in danger, and for an injury received from a passing southbound car cannot recover unless its motorman had a last clear chance to protect him and failed to use such chance.

Mulvaney v. Terre Haute, etc., Traction Co., 270, 273 (1).

9. *Carriage of Passengers.—Assault and Battery on Passenger.—Excessive Damages.*—In an action against a traction company by a physician to recover damages for an assault committed upon him by defendant's conductor, a verdict for \$500 was not excessive, even though plaintiff sustained no serious personal injuries, as he was entitled to recover for humiliation and wounded feelings, and the evidence showed there were other passengers on the car. *Fort Wayne, etc., Traction Co. v. Ridenour*, 263, 265 (2).

10. *Carriage of Passengers.—Assault Upon Passenger.—Action.—Complaint.—Sufficiency.*—In an action against a railroad company for damages for an assault and battery claimed to have been inflicted upon plaintiff while he was a passenger on defendant's train, a complaint alleging that defendant's brakeman could easily have prevented the assault, but wrongfully, negligently and unlawfully, and in disregard of his duty, stood by and permitted the assault to be committed upon plaintiff and made no effort or attempt to prevent the same, states a cause of action.

Pittsburgh, etc., R. Co. v. Retz, 581, 584 (1).

11. *Carriage of Passengers.—Boarding on Wrong Side.—Last Clear Chance.—Knowledge of Peril.*—In the absence of knowledge by the motorman of an approaching southbound street car, moving along the west rails of double tracks, of the peril of one attempting to board from the west side a street car moving to the north on the east rails of such double tracks, the doctrine of last clear chance does not apply.

Mulvaney v. Terre Haute, etc., Traction Co., 270, 274 (2).

CARRIERS—Continued.

12. *Carriage of Passengers.—Destination of Passenger.—Notice to Carrier.*—There is no primary obligation on a passenger for a flag station to notify the train conductor of his destination, as stipulated in his ticket, before the arrival of the train at such point, in the absence of a rule of the carrier, known to the passenger, requiring that such notice be given.

Pittsburgh, etc., R. Co. v. Boys, 102, 114 (5).

13. *Carriage of Passengers.—Destination of Passenger.—Notice to Carrier.*—In the absence of a rule of the company, so known and promulgated as to bind the passenger, requiring a passenger for a flag station to notify the train conductor of his destination, as stipulated in the ticket, before the arrival of the train at such point, the ticket sold by the carrier to the passenger is conclusive notice to the former of the fact of the passenger's destination.

Pittsburgh, etc., R. Co. v. Boys, 102, 114 (6).

14. *Carriage of Passengers.—Injuries to Passenger.—Contributory Negligence.—Alighting from Moving Train.*—It is not negligence *per se* for a passenger to alight from a moving train.

Pittsburgh, etc., R. Co. v. Boys, 102, 107 (3).

15. *Carriage of Passengers.—Injuries to Passengers.—Action.—Complaint Showing Contributory Negligence.—Sufficiency.*—In an action against a railroad company for injuries sustained by a passenger in alighting from a moving train at a flag station, paragraph of complaint *held* to show plaintiff guilty of such negligence as to preclude recovery.

Pittsburgh, etc., R. Co. v. Boys, 102, 106, 107 (2).

16. *Carriage of Passengers.—Injuries to Passenger.—Action.—Complaint.—Sufficiency.—Negligence.*—In an action against a railroad company by a passenger for injuries sustained in alighting from a moving train at a flag station, a complaint alleging that the injuries resulted from the negligence of defendant in not stopping the train as scheduled and advertised, and on account of the brakeman leading plaintiff to believe that the train had come to a full stop, *held* to show negligence on part of defendant.

Pittsburgh, etc., R. Co. v. Boys, 102, 106 (1).

CASES—

Cited, see p. vii.

Disapproved, see **APPEAL** 14.

Distinguished, see **VENDOR AND PURCHASER** 2.

Reported, see p. iii.

CAUSA MORTIS—

Gifts, requisites, see **GIFTS**.

CAVEAT EMPTOR—

Principle, applicability, see **SALES** 14.

CERTIFICATE—

Of recorder, as to deeds, sufficiency, see **EVIDENCE** 8.

CHARACTER—

Of relatrix, credibility, see **WITNESSES**.

CHASTITY—

Want of, credibility of relatrix, instruction, see **BASTARDS** 8.

CHATTEL MORTGAGES—

1. *Agent to Conduct Business.—Undisclosed Principal.—Mortgage by Agent.—Rights of Mortgagee.*—When an agent with power to conduct the business in his own name at retail mortgages, to a creditor for balance due on goods purchased, the entire stock of goods, the mortgagee has only the rights of a general creditor in the property, since to uphold the mortgage would be to effectuate a sale at wholesale, but the mortgagee would have, upon discovery of the fact of agency, a right of action against the owner for the amount of his debt.

Cathcart v. Dalton, 650, 655 (5).

2. *Husband and Wife.—Agency.—Conversion.—Instructions.*—In an action by the wife for conversion of her stock of goods, taken by the defendants under a chattel mortgage executed by the husband without authority, an instruction was correct that told the jury that, where the defendants relied on an estoppel of the plaintiff to claim ownership by having permitted her husband to operate the store, buy and sell goods, etc., in his own name, such an agency did not authorize a sale at wholesale or mortgage of the goods, and that the wife would not be bound by a mortgage given without her knowledge or authority nor by a sale at wholesale under the mortgage, and that if the defendants sold her property under such a mortgage, she was entitled to recover its value.

Cathcart v. Dalton, 650, 656 (6).

3. *Sales Under Mortgages.—Strict Compliance with Terms.*—One who takes property under the terms of a chattel mortgage and sells the same must, in a subsequent action for conversion by an alleged owner thereof, prove an advertisement of the sale by the notices, in the places and for the time prescribed by the mortgage.

Cathcart v. Dalton, 650, 654 (3).

4. *Sales Under Mortgages.—Action for Conversion.—Defense of Estoppel.—Question for Jury.*—In an action for conversion of goods sold under a chattel mortgage executed without authority by an agent, where the defense is estoppel by conduct in permitting the agent to so conduct the business as his own as to lead defendants to believe that he was the owner, knowledge or the want thereof, on the part of defendants, as to plaintiff's ownership of the property is a question of fact for the jury.

Cathcart v. Dalton, 650, 654 (2).

CITIES—

See MUNICIPAL CORPORATIONS.

CLAIMS—

See EXECUTORS AND ADMINISTRATORS.

Necessity of filing, in bringing action on contractor's bond, see HIGHWAYS.

CLERKS OF COURTS—

Judgments.—Distribution of Proceeds.—Liability.—Attorneys' Fees.—Lien.—The mere filing by attorneys of a declaration of intention to hold a lien for attorneys' fees on a judgment secured for a client imposed no official duty on the clerk of the court to pay the lien to them until after the validity and extent of the same had been properly determined. *State, ex rel. v. Bleeke*, 23, 27 (4).

COLLATERAL ATTACK—

See JUDGMENT 1.

COMITY —

Limitation of doctrine by statute, see **CORPORATIONS 1.**

COMMISSIONERS—

See **DRAINS; INJUNCTION 3.**

COMMON LAW—

Abrogation, when implied, see **STATUTES 1.**

Negligence, jury question, see **NEGLIGENCE 2.**

Wrongful death, not actionable, see **DEATH 4.**

Release of surety, effect on other sureties, see **PRINCIPAL AND SURETY 2.**

COMPENSATION—

Workmen's, proceedings before Industrial Board, see **MASTER AND SERVANT 7-25.**

COMPLAINT—

See **PLEADING.**

CONCLUSIONS—

In pleading, effect in absence of motion, see **PLEADING 9.**

Of law, see **APPEAL 10, 11; TRIAL 37, 39.**

CONDITIONAL SALES—

See **SALES 10.**

CONFESSION—

Of error, acts constituting, see **APPEAL 38.**

CONFLICT OF LAWS—

See **MARRIAGE 2.**

CONSTRUCTION—

See **STATUTES; WILLS.**

Entry, general rules, see **APPEAL 3.**

Of policy, see **INSURANCE 27, 28.**

CONTINUANCE—

See also **APPEAL 97.**

Grounds.—Amendment to Complaint.—In a passenger's action against a railroad company for injuries sustained by the derailment of a train, where the complaint charged that the engine and cars were defective and insufficient in certain particulars unknown to plaintiff, so that they were liable to derailment, an amendment to the complaint, made to make it conform to the evidence, alleging that one car was of unusual height and size, and was stiff and new, and was thereby liable to derailment, did not bring a new charge of negligence, its only effect being to make the complaint more specific, so that it was not error to overrule a motion for a continuance on account of the amendment. *Cleveland, etc., R. Co. v. Locke, 35, 39 (2).*

CONTRACTS—

See also **AGRICULTURE; APPEAL 101; CHATTEL MORTGAGES; CORPORATIONS 2, 7; DEATH; EVIDENCE 1; EXECUTORS AND ADMINISTRATORS; FRAUDS, STATUTE OF; INSANE PERSONS; INSURANCE; LANDLORD**

CONTRACTS—Continued.

AND TENANT; LIMITATION OF ACTIONS; MASTER AND SERVANT 11, 12, 18; NEGLIGENCE 3; PARTITION; SALES; TENDER; TRIAL 39; VENDOR AND PURCHASER.

Rescission.—Question of Fact.—Rescission is a question of fact.

Pfafflin v. Schmidt, Admr., 496, 504 (2).

CONTRACTORS—

Bond, action by subcontractor, filing claim, necessity, see HIGHWAYS.

Rights, in suit to enjoin drainage assessments, see INJUNCTION 4.

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE.

CORPORATIONS—

See also AGRICULTURE; MECHANICS' LIENS 4; TAXATION 2.

1. *Foreign Corporations.—Admission.—Comity.—Limitation by Statute.*—The doctrine of state comity cannot prevail in the judicial construction of the nature of acts performed by a foreign corporation within this state, under §§4085 *et seq.* Burns 1914, Acts 1907 p. 286, since §8 of the statute, §4093 Burns 1914, expressly states that the statute is a limitation upon interstate comity. *Lowenmeyer v. National Lumber Co.*, 458, 464 (4).
2. *Foreign Corporations.—Contracts.—Assignees.—Noncompliance with Statutes.—Resort to Courts.*—The assignee of the contract of a foreign corporation cannot assert any rights thereunder which could not have been asserted by the foreign corporation through which he claims by assignment from its trustee in bankruptcy and an intervening third person where the corporation has failed to comply with a statute giving it a right to transact business in the state, notwithstanding that the assignee took the contract before breach thereof. *Lowenmeyer v. National Lumber Co.*, 458, 466 (6).
3. *Foreign Corporations.—Admission.—Noncompliance with Statutes.—Stockholders.—Estoppel.*—A stockholder in a foreign corporation which has not complied with the statute regulating its admission to do business in the state is not estopped in an action brought against him upon a contract between him and the corporation from asserting such failure to comply as a defense to such action. *Lowenmeyer v. National Lumber Co.*, 458, 467 (7).
4. *Foreign Corporations.—Admission.—Noncompliance with Statute.—Resort to Courts.—Inhibition Unlimited.*—The resort by a foreign corporation to the courts of this state without first having complied with the requirements of §4085 *et seq.* Burns 1914, Acts 1907 p. 286, is inhibited by §9 of the statute, §4094 Burns 1914, equally against a claim arising out of an isolated or preliminary transaction as against one arising out of the usual business conducted by the corporation. *Lowenmeyer v. National Lumber Co.*, 458, 465 (5).
5. *Foreign Corporations.—Admission.—Purchasing and Using Site.*—Where a foreign corporation purchases real estate for use as a coal yard and so uses the same in conducting a retail coal business within this state, such purchase is not an isolated transaction, and the act of acquiring such site fell within the inhibition against doing business provided in §4085 Burns 1914, Acts 1907 p. 286, §1. *Lowenmeyer v. National Lumber Co.*, 458, 464 (3).

CORPORATIONS—Continued.

6. *Foreign Corporations.—Admission.—Statutes.—Construction.*—When statutes governing the admission into the state of foreign corporations do not specify what shall constitute "doing business" or "transacting business," such question is ordinarily a matter for judicial determination.

Lowenmeyer v. National Lumber Co., 458, 464 (1).

7. *Foreign Corporations.—Transacting Business.—Isolated Acts.—Construction.*—Where a foreign corporation enters into a single contract or engages in some other isolated business act within a particular state, with no intention to repeat the same therein or make such state a base for the conduct of any part of its corporate business, the courts as a rule have held that such corporation cannot be said to be "doing business" or "transacting business" within the meaning of the usual statutory provisions regulating the admission of foreign corporations.

Lowenmeyer v. National Lumber Co., 458, 464 (2).

CONVERSION—

See HUSBAND AND WIFE 6.

Action, instructions, jury questions, see CHATTEL MORTGAGES 2, 4.

COUNTERCLAIM—

See PLEADING 11; SALES 14.

COURTS—

Clerks of, judgments, attorneys' fees, lien, see CLERKS OF COURTS.

Rules, briefing, see APPEAL 32-54.

Rules, change of venue, see TIME.

Trial by, see TRIAL 37-40.

1. *Appellate Court.—Decisions of Supreme Court.—Conclusiveness.*—A decision of the Supreme Court is binding upon the Appellate Court until overruled.

First Nat. Bank, etc. v. Mayr, 81, 101 (2).

2. *Jurisdiction.—Recognition by Party.*—It would seem that taking an appeal to the Appellate Court recognizes the settlement of constitutional questions upon any statute involved to the extent that they have been passed upon by the Supreme Court.

Public Utilities Co. v. Reader, Admx., 485, 489 (4).

3. *Precedents.—Jurisdiction of Appellate Court.*—The constitutionality of the Employers' Liability Act of 1911 having been determined by the Supreme Court, that question cannot be raised in the Appellate Court, the decision of the Supreme Court being conclusive.

Public Utilities Co. v. Reader, Admx., 485, 489 (3).

COVERTURE—

Defense, in action against wife, pleading, see HUSBAND AND WIFE 1.

CREDIBILITY—

Of relatrix, instructions, see BASTARDS 8; WITNESSES.

CREDITORS—

Maker of note, when preferred creditor, see BANKS AND BANKING.

CROSS-COMPLAINT—

Motion for new trial on, finding against defendant, effect, see NEW TRIAL 3.

CROSSINGS—

Accidents, liability, see RAILROADS; STREET RAILROADS 1, 2.
Maintenance, rights and duties, see RAILROADS 12.

DAMAGES—

See also APPEAL 77; ASSAULT AND BATTERY; INJUNCTION 1, 2, 4;
MASTER AND SERVANT; RAILROADS; SALES; STREET RAILROADS;
TRIAL 18, 21, 36, 39.

1. *Amount.—Review.*—The Appellate Court cannot say that a verdict for \$1,650 is excessive or due to improper influences where the plaintiff has sustained a fall during which she struck her hand upon a wooden bench, sprained her thumb and wrist, twisted her body and suffered a rupture, and was permanently injured thereby. *City of New Albany v. Stallings*, 232, 237 (7).
2. *Thrashing Machine.—Loss of Use.*—In an action against a railroad for damage to a separator at a crossing, the fair rental value of the machine was a proper element of damages, where it was damaged in thrashing season, and there was evidence of the number of days' work ahead of it and of the fair rental value per day. *New York Central R. Co. v. Reidenbach*, 390, 393 (2).

DEATH—

See also EVIDENCE 2; NEGLIGENCE 9.
Gifts *causa mortis*, requisites, see GIFTS.

1. *Actions.—Right of Action.—Release from Decedent.*—An action by a personal representative under §285 Burns 1914, Acts 1899 p. 406, for the wrongful death of his decedent, will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death.
Haskell, etc., Car Co. v. Logermann, Adm., 69, 75 (4).
2. *Death by Wrongful Act.—Release from Decedent.—Disaffirmance.*—Where an injured servant entered into a contract of settlement with an employer for injuries which later resulted in his death, it will be presumed, in the absence of a showing to the contrary, that, if the administratrix of his estate took money from its assets to make a tender on disaffirming such contract, she acted in compliance with an order of court, and, if she acted without such an order, the presumption will be that as the legal representative in the settlement of the estate she had given a sufficient bond to protect the estate's interest, so that the employer in no event is in a position to complain.
Haskell, etc., Car Co. v. Logermann, Adm., 69, 75 (8).
3. *Wrongful Death.—Actions.—Release by Injured Insane Person.—Right of Action by Personal Representative.*—Where an injured servant while of unsound mind entered into a contract of settlement with his employer he had, at the time of his death, a right of action for his injuries which could have been maintained through his guardian, since the settlement was voidable, and after his death from such injuries his legal representative could prosecute an action under §285 Burns 1914, Acts 1899 p. 406, authorizing a recovery for wrongful death.
Haskell, etc., Car Co. v. Logermann, Adm., 69, 75 (6).
4. *Wrongful Death.—Recovery.—Common Law.—Statute.*—At common law there could be no recovery for death by wrongful act, but such an action is authorized by §285 Burns 1914, Acts 1899 p. 406. *Haskell, etc., Car Co. v. Logermann, Adm.*, 69, 74 (3).

DEBT—

Of another, voluntary payment, ratification, effect, see **MONEY PAID**.

DECEDENTS—

Estates of, see **EXECUTORS AND ADMINISTRATORS**.

DECLARATIONS—

See **EVIDENCE** 5, 6.

DEDICATION—

Streets, title of adjoining owner, see **BOUNDARIES** 2.

DEEDS—

See also **ADVERSE POSSESSION**; **BOUNDARIES** 3; **EVIDENCE** 8; **TAXATION** 5.

DEFAULT—

Relief, excusable neglect, see **JUDGMENTS** 8.

DELAY—

Action for, see **CARRIERS** 4, 5.

DEMAND—

Jury question, see **REPLEVIN**.

DEMURRER—

See **PLEADING**.

Review of rulings on, see **APPEAL** 61, 63, 65, 107-109, 111.

DEPENDENCY—

Jury question, see **BENEFICIAL ASSOCIATIONS**.

DEPOSITORIES—

See also **APPEAL** 5.

Designation.—Approval of Bond.—Ministerial Acts.—The approval of bond and designation of depository provided by §13, Acts 1907 p. 391, §7534 Burns 1914, are ministerial acts and not judicial, whether performed by the board of finance or by the judge of the circuit court. *Board, etc. v. First Nat. Bank, etc.*, 290, 296 (5).

DEPUTIES—

Power of sheriff to appoint, see **PROCESS**.

DEWISEES—

Rights, election by husband, statute, see **WILLS** 7.

DISABILITY—

Permanent, sufficiency of findings, to support award, see **MASTER AND SERVANT** 24.

DISAFFIRMANCE—

Administrator's right, see **TENDER**.

DISCRETION—

Of trial court, see **APPEAL** 74, 75; **BASTARDS** 3; **PLEADING** 2, 5.

Of appellate court, see **APPEAL** 50.

Of officers, immunity from liability, see **OFFICERS** 3; **SCHOOLS AND SCHOOL DISTRICTS** 3.

DISMISSAL—

See APPEAL 55-57.

DITCHES—

See DRAINS.

DIVORCE—

See also HUSBAND AND WIFE 7; JUDGMENTS 4.

1. *Alimony.—Property Rights.—Knowledge of Facts.—Res Judicata.*—A decree for divorce containing a judgment for alimony obtained by a wife, is a bar to an action begun by her on the day the decree was rendered to compel a deed to her by her former husband and to quiet title in her to real estate bought during the coverture, the title to which was taken in the name of both parties, on the theory that the purchase price was paid by her out of her own estate, when it must be assumed from the complaint, from the absence of allegations to the contrary, that she knew at the time the contract for the deed was made, of its provision for a conveyance to husband and wife, and that she knew prior to the decree of divorce that the deed had not been made to her alone. *Wagner v. Treesh*, 551, 554 (3).

2. *Alimony.—Property Rights.—Modification of Decree.*—Where a wife, on the day a decree for alimony sought by her is rendered, learns for the first time that the title to certain real estate was joint and not in her alone as she had supposed, it is her duty to so inform the court, and it is proper for her to make an application to have the title adjudicated in that action and to have a proper judgment for alimony made.

Wagner v. Treesh, 551, 554 (5).

3. *Judgment.—Property Rights.—Res Judicata.*—A decree of divorce by a court having jurisdiction of the subject-matter and parties is an adjudication of all property rights or questions growing out of or connected with the marriage, and the parties are precluded thereby as to all matters which might have been legitimately proved in support of the charges or defenses in the action.

Wagner v. Treesh, 551, 554 (2).

DOCUMENTS—

As evidence, see EVIDENCE 8, 9.

DRAINS—

See also INJUNCTION 2-5.

- Assessments.—Collection.—Action to Enjoin.—Parties.—Drainage Commissioner.—Statute.*—Under §6144 Burns 1914, Acts 1907 p. 508, a commissioner appointed by the court to complete the construction of a drainage ditch after the work had been abandoned by the contractor was neither a necessary nor a proper party to landowner's action to restrain the enforcement of the collection of assessments. *State, ex rel. v. Allen*, 160, 166 (1).

EDUCATION—

See SCHOOLS AND SCHOOL DISTRICTS.

EMPLOYES—

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT—

See MASTER AND SERVANT 2, 3.

Constitutionality, jurisdiction of Appellate Court, see COURTS 3.

"EMPLOYMENT"—

Definition, see **MASTER AND SERVANT** 20.

EQUITY—

See also **BILLS AND NOTES**; **MARRIAGE** 4.

1. *Principles.—Disregarding Form for Substance.*—Equity will disregard mere forms, and will not permit a substantial right to be defeated by the interposition of merely nominal or technical distinctions. *Leeka v. Muncie, etc., Loan Co.*, 318, 324 (1).
2. *Taxation.—School Fund Mortgage.—Auditor's Sales.—Action for Reconveyance.—Quiet Title.—Tender Before Suit.*—In an action for reconveyance of lands and to quiet the title thereto against the holder of deeds from the county auditor following sales to satisfy school fund loans and taxes, an offer by the plaintiff before suit to pay the full amount of taxes, penalty, interest and costs, and the full amount of principal, interest, penalties and costs paid out upon the school fund sale, was sufficient. *Miller v. Meadows*, 337, 342 (6).

ESTATES—

Of decedents, see **EXECUTORS AND ADMINISTRATORS**.

ESTOPPEL—

See also **AGRICULTURE**; **CHATTEL MORTGAGES** 2, 4; **CORPORATIONS** 3; **MECHANICS' LIENS** 3.

Obstruction of Public Highway.—Action for Injunction.—Designation in Deeds as Private Way.—User.—In an action to enjoin the obstruction by an adjoining landowner of a strip of land used by plaintiff as a driveway, plaintiff was not estopped to claim that the strip was a public alley because of the fact that in every conveyance in his chain of title the alley was designated as a private alley, where plaintiff's cause of action was based not upon the deeds, but upon the theory that the strip had become a public highway by user. *Donner v. Griffith*, 693, 697 (2).

EVIDENCE.

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|-------------------------------------------------------------|----------------------------------------|
| I. BURDEN OF PROOF. | VI. HEARSAY, 7. |
| II. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL, 1, 2. | VII. DOCUMENTARY EVIDENCE, 8, 9. |
| III. DEMONSTRATIVE EVIDENCE, 3. | VIII. PAROL OR EXTRINSIC EVIDENCE, 10. |
| IV. ADMISSIONS, 4. | IX. OPINION EVIDENCE, 11. |
| V. DECLARATIONS, 5, 6. | X. WEIGHT AND SUFFICIENCY, 12. |

In particular actions or proceedings, see also the specific topics.

Reception at trial, see **TRIAL**.

Review of rulings on evidence, see also **APPEAL** 76-96.

Inferences from evidence, right to draw, see **MASTER AND SERVANT** 21; **TRIAL** 9.

Presumptions, see **HUSBAND AND WIFE** 9, 10; **MASTER AND SERVANT** 9; **STREET RAILROADS** 14.

Tax deed, when not *prima facie* evidence of title, see **TAXATION** 6.

I. BURDEN OF PROOF.

As to consideration for transfer of realty from husband to wife, see **FRAUDULENT CONVEYANCES**.

As to right of exemption, see **TAXATION** 1.

As to regularity of tax sale, see **TAXATION** 5.

EVIDENCE—Continued.

As to rescission of contract, see **VENDOR AND PURCHASER 1.**

As to suretyship of wife on joint obligation with husband, see **HUSBAND AND WIFE 10.**

As to want of knowledge, in wife's action for conversion of goods seized under chattel mortgage, see **HUSBAND AND WIFE 6.**

Instruction as to burden of showing freedom from negligence, see **TRIAL 13.**

II. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

1. *Sales.—Actions for Breach of Contract.—Evidence of Calls for Goods by Customers.*—Where, in an action on an executory contract for the sale of goods, for breach by failure to deliver, the lost profits of the buyer are proper for consideration on the question of damages, evidence that there was a demand for the goods ordered is admissible.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 439 (10).

2. *Action for Wrongful Death.—Conversations Not Part of Res Gestae.—Admissibility.*—In an action under the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), for the wrongful death of a servant, testimony by one of employer's two servants who had charge of the machine which injured decedent, detailing a conversation between himself and his coemployee and assistant after the accident tending to show the negligent operation of the machine, was inadmissible, since the conversation was not part of the *res gestae*.

Haskell, etc., Car Co. v. Logermann, Adm., 69, 76 (9).

III. DEMONSTRATIVE EVIDENCE.

3. *Introduction.—Connecting Evidence.—Exhibits.*—The court may properly require proof that there was no change in the condition of the automobile of defendant after the collision in issue and before photographs thereof were taken, as a condition to permitting the exhibition of such photographs to the jury.

Steckbeck v. Worman, 666, 668 (3).

IV. ADMISSIONS.

4. *Action to Enjoin Obstruction of Highway.—Conversation with Former Owner of Land.—Admissibility.*—In an action to enjoin the obstruction by an adjoining landowner of a strip of his land used by plaintiff as a driveway, a conversation between a former owner of plaintiff's property and the agent who sold the property to such former owner relating to an alleged parol license by which the agent authorized the use of the strip in controversy for a driveway, was admissible in evidence.

Donner v. Griffith, 693, 699 (5).

V. DECLARATIONS.

5. *Insurance.—Actions on Policies.—Declarations of Insured.*—A statement made by the insured to his wife, at their home, three miles from the place of the accident, and eight or ten hours thereafter, that he had to pull a sewer gas plug and got sewer gas, was not part of the *res gestae*, and was inadmissible in an action by the widow of the insured upon his accident policy for the loss of life by inhalation of sewer gas.

Massachusetts Bonding, etc., Co. v. Free, 275, 280 (9).

EVIDENCE—Continued.

6. *Testimony as to Declarations Out of Court.—Admissibility.—Limiting to Purpose of Impeachment.*—Where there was judgment for a tenant in a landowner's action for an injunction to restrain him from harvesting and disposing of a crop of wheat, and the tenant sued on the injunction bond to recover damages, it was proper for the trial court, in admitting testimony of declarations made by the tenant as to the ownership of the wheat involved, to limit the use of such evidence to the purpose of impeachment, since, although declarations and statements of a party made out of court may be proved, not merely to impeach the party, but as substantial proof of a fact in controversy, the ownership of the wheat was determined in the injunction proceedings, so that it was not in issue in the action on the bond.
Ross v. Felter, 58, 63 (5).

VI. HEARSAY.

7. *Effect of Failure to Object.*—Hearsay evidence unobjected to may be accepted as establishing the fact which it tends to prove.
Spahr, Admr., v. Polcar, 523, 525 (3).

VII. DOCUMENTARY EVIDENCE.

See also **BASTARDS 2.**

8. *Admissibility.—Deeds.—Form of Certificate.—Sufficiency.—Statute.*—A county recorder's certificate to copies of deed's reciting that each was a "true and correct" copy of the original was in substantial compliance with §478 Burns 1914, §462 R. S. 1881, requiring certifications that the copy is "true and complete," and such copies were admissible as evidence.
Donner v. Griffith, 698, 698 (4).
9. *Admissibility.—Transcript of Injunction Proceedings.—Action on Injunction Bond.*—Where there was final judgment in an action for an injunction, the transcript of the proceedings in that action was properly admitted in evidence in defendant's action on the injunction bond given by the plaintiff.

Ross v. Felter, 58, 62 (4).

VIII. PAROL OR EXTRINSIC EVIDENCE.

10. *Resolutions.—Scope.*—The scope of a resolution cannot be enlarged beyond what reasonably appears from its context, even by a member of the adopting body.
Nordyke, etc., Co. v. Swift, 176, 180 (1).

IX. OPINION EVIDENCE.

11. *Expert Testimony.—Removing Wiring from Building Without Injury.*—In an action in replevin to recover certain telephone wires, cable terminals, etc., installed in a hotel building, testimony of an expert that such equipment could be removed without great injury to the building was proper.

Meeker Hotel Co. v. Forgan, 199, 201 (2).

X. WEIGHT AND SUFFICIENCY.

12. *Circumstances.—Consideration.*—It is the duty as well as the right of the jury, in rendering a verdict and in answering interrogatories, to take into consideration not only the testimony of the witnesses but also the facts and circumstances proved by the evidence and that surround the case, together with reasonable inferences that can be drawn therefrom.

New York Central R. Co. v. Reidenbach, 390, 394 (3).

EXCEPTIONS—

Grounds for review, see **APPEAL** 8, 12.

EXCEPTIONS, BILL OF—

Failure to file in time, effect, see **APPEAL** 22.

EXECUTORS AND ADMINISTRATORS—

See also **DEATH**; **TENDER**; **WILLS**.

1. *Claims Against Estates.—Action on Implied Contract of Hire.—Jury Questions.*—In an action on a claim against decedent's estate for services rendered decedent in which claimant sought recovery on the theory of an implied contract, it was for the jury to determine whether claimant performed services for decedent at his request, or whether he availed himself thereof knowing, or having reasonable ground to believe, that compensation was expected. *Weesner, Admr., v. Weesner*, 237, 240 (2).
2. *Claims Against Estate.—Implied Contract of Hire.—Continuous Services.*—In an action on a claim against a decedent's estate for compensation for services performed by claimant for her father-in-law during a period of about ten years, the action being based on the theory of an implied contract of hire, evidence held to sustain verdict for plaintiff, both as to the implied contract by decedent to pay for the services and as to the services being continuous. *Weesner, Admr., v. Weesner*, 237, 241 (6).
3. *Services Rendered Decedent.—Contract of Hire.—When Implied.*—If services were performed at the request of decedent, or, if he knowingly availed himself thereof and had reasonable ground to believe that compensation therefor was expected, the law will imply a promise to pay what such services are reasonably worth. *Weesner, Admr., v. Weesner*, 237, 240 (3).
4. *Services Rendered Decedent.—Contract of Hire.—When Implied.*—If the circumstances authorized the person rendering services to decedent reasonably to expect payment therefor, or by way of furtherance of the intention of the parties, or because reason and justice require compensation, the law will imply a contract therefor. *Weesner, Admr., v. Weesner*, 237, 240 (4).

EXECUTORY CONTRACTS—

See **SALES** 12, 13.

EXHIBITS—

See **EVIDENCE** 3; **PLEADING** 14; **TRIAL** 4.

EXPERTS—

Testimony of, see **EVIDENCE** 11.

FEES—

Of county treasurer for collection of delinquent city assessments, see **MUNICIPAL CORPORATIONS** 1.

FINDINGS—

Of Industrial Board, see **MASTER AND SERVANT** 21, 22.

Review, see **APPEAL** 89-93, 103, 104.

FIRE—

From threshing machine, action, evidence, see **NEGLECT** 4.

FIRE INSURANCE—

See **INSURANCE**.

FORECLOSURE—

See MORTGAGES.

FORFEITURE—

Self-executing by-laws, see INSURANCE 26.

Waiver of right, see INSURANCE 16.

FRAUD—

See also APPEAL 83; INSURANCE 19, 20; MARRIAGE; PRINCIPAL AND SURETY 1.

FRAUDS, STATUTE OF—

1. *Oral Agreement to Buy Land.—Payment of Purchase Price.*—Payment of the purchase price is not sufficient part performance to take out of the operation of the statute of frauds an oral contract for the sale of land. *King v. Hartley*, 1, 9 (3).
2. *Oral Agreement to Buy Land.—Possession.*—Where a tenant in common in possession of land orally agreed to purchase the interest of a cotenant, the mere fact that he remained in possession was insufficient to take the case out of the statute of frauds, since there was no taking or change of possession under the terms of the contract. *King v. Hartley*, 1, 5 (2).

FRAUDULENT CONVEYANCES—

Husband and Wife.—Burden of Proof.—Where a husband, shortly after wrongfully killing a man, made a deed to his wife, leaving no property with which to pay his general creditors, or any claim growing out of such killing, the burden of proof, in an action to set aside such deed, rests upon the grantee to show an actual indebtedness owing by grantor to her.

Murray v. Sumner, 607.

FREIGHT—

See CARRIERS.

GAS—

See MINES AND MINERALS.

GIFTS—

1. *Gifts Causa Mortis.—Requisites.—Delivery.*—To constitute a gift *causa mortis*, there must be a transfer or delivery of the property in expectation of death from an existing illness. *Martin v. Seibert, Admr.*, 564, 566 (1).
2. *Gifts Causa Mortis.—Requisites.—Delivery.—Evidence.*—A letter sent to one claiming certain money belonging to a decedent's estate as trustee under an alleged gift *causa mortis*, stating that the writer would make her money payable to claimant, and another letter to a bank, "As I have to go to a hospital and have an operation, and should anything happen to me, I make my money payable to" claimant, both letters having been written by decedent just prior to entering a hospital to submit to an operation, which resulted in her death, are insufficient to show a valid gift *causa mortis*, in the absence of a delivery of the money to claimant. *Martin v. Seibert, Admr.*, 564, 566 (2).

GUESTS—

See INNKEEPERS.

HARMLESS ERROR—

See APPEAL 97-110.

HEARSAY—

See EVIDENCE 7.

HIGHWAYS—

See also APPEAL 78; ESTOPPEL; EVIDENCE 4; MUNICIPAL CORPORATIONS 3.

Improvement.—Contractor's Bond.—Action by Subcontractor.—Filing Claim.—Sections 5901a, 5901b Burns 1914, Acts 1911 p. 437, do not require a subcontractor to file his claim with the county auditor preliminary to filing suit on the contractor's bond to recover a balance due him for the improvement of a public highway.
U. S. Fidelity, etc., Co. v. State, ex rel., 648.

HOTELS—

See INNKEEPERS.

HUSBAND AND WIFE—

See also BOUNDARIES; CHATTEL MORTGAGES 2; DIVORCE; FRAUDULENT CONVEYANCES; MARRIAGE; WILLS 7.

1. *Action Against Wife.—Defense.—Coverture.—Pleading.*—The defense arising from coverture is a personal defense, and, when pleaded to an action on contract against a married woman, the plaintiff must reply facts which show that the contract sued on is one on which she is bound.

Aldridge v. Clasmeyer, 43, 51 (1).

2. *Adverse Possession.—Joint Possession.—Effect.*—Joint possession by husband and wife of the land of the husband is in law the possession of the husband.

Burcham v. Roach, 669, 674 (3).

3. *Adverse Possession.—Joint Possession.*—Neither husband nor wife can acquire title by adverse possession to land owned by the other by joint occupation during coverture.

Burcham v. Roach, 669, 672 (2).

4. *Agency.—Creation.—Evidence.*—Evidence held sufficient to sustain a finding that the husband of one of defendants had authority from such defendant to enter into agreement to arbitrate.

Milhollin v. Milhollin, 477, 481 (3).

5. *Agency.—Rules.*—The relation of agency between husband and wife is governed by the same rules which apply to other agencies.

Milhollin v. Milhollin, 477, 481 (2).

6. *Conversion.—Chattel Mortgages.—Knowledge.—Burden of Proof.*—In an action by a wife for conversion of a stock of goods seized by defendants under a chattel mortgage executed by the husband without authority, where the defense was that the wife had led the defendants to believe that the property was owned by the husband, the defendants had the burden of proving their want of knowledge of the ownership or claim of ownership on the part of the wife.

Cathcart v. Dalton, 650, 654 (1).

7. *Entirety.—Estate By.—Purchase-Money Mortgage During Coverture.—Divorce.—Suretyship.*—A divorced wife cannot successfully plead suretyship under §7855 Burns 1914, §5119 R. S. 1881, in an action on a bond and mortgage executed by herself and husband during coverture to obtain money to pay and used to pay a note given by the husband alone for money used to pay in part for the land involved, the title to which had been taken in the husband and wife, although the wife had contributed nothing to the payment of the price thereof.

Leeka v. Muncie, etc., Loan Co., 318, 325 (2).

HUSBAND AND WIFE—Continued.

8. *Joint Obligations.—Action.—Plea of Suretyship by Wife.—Reply.—Sufficiency.*—In an action against husband and wife to recover on notes executed by them in payment of the purchase price of a store, and to foreclose a mortgage securing the payment of the notes, paragraph of plaintiff's reply to paragraphs of answer filed by the wife pleading suretyship, *held* to show sufficiently that she acquired a beneficial interest in the store by purchase, so that she would be a principal and not a surety on the notes.
Aldridge v. Clasmeyer, 43, 52 (2).
9. *Joint Obligations.—Relation of Wife.—Presumption.*—That the notes sued on were the joint obligations of defendants, husband and wife, and that the title to the real estate involved was held by them as tenants by entireties at the time they executed the mortgage in suit to secure the notes, would, standing alone, create a presumption that the wife was a principal on the notes, and not a surety, and, where the other facts found by the court tend to support this presumption rather than to rebut it, the presumption stands.
Aldridge v. Clasmeyer, 43, 54 (6).
10. *Joint Obligations.—Wife as Surety.—Burden of Proof.*—Where the obligation sued upon is that of husband and wife, and is secured by mortgage on real estate held by them as tenants by entireties, there is no presumption that the wife is surety, or that the consideration obtained was not used for the benefit of her joint estate, and the burden is upon her to allege and prove that she executed such obligation as surety and not as principal.
Aldridge v. Clasmeyer, 43, 53 (5).
11. *Wife's Right to Separate Earnings.*—A wife's separate earnings for services other than those rendered to the family belong to her, and, where she had performed services, it is a question of fact whether she contributed them as services for her husband or family, or performed them pursuant to an agreement between herself and the stranger for whom they were rendered.
Weesner, Admr., v. Weesner, 237, 242 (7).

IMPEACHMENT—

Limiting testimony as to declarations, see EVIDENCE 6.

IMPLIED CONTRACTS—

Services rendered decedent, see EXECUTORS AND ADMINISTRATORS;
LIMITATION OF ACTIONS.

INDEPENDENT CONTRACTORS—

Liability for dangerous structures, see NEGLIGENCE 7.

INDUSTRIAL BOARD—

See MASTER AND SERVANT 7-25.

INHERITANCE TAX—

Deduction of amount of federal estate tax, see TAXATION 4.

INJUNCTION—

See also DRAINS; ESTOPPEL; EVIDENCE 4; JUDGMENT 5.

1. *Action on Bond.—Measure of Damages.*—In an action on an injunction bond given plaintiff tenant when enjoined from harvesting or disposing of a crop of wheat, plaintiff was entitled to recover the fair market value of the wheat when taken, personal expenses and loss of time necessarily spent in the action, together

INJUNCTION—Continued.

with such reasonable attorney fees as he may have incurred on account of the injunction proceedings.

Ross v. Fetter, 58, 63 (6).

2. *Action on Injunction Bond.—Right of Recovery.—Failure to Plead Damages.*—A drainage contractor, who intervened in a suit by landowners to restrain the collection of drainage assessments, could not recover expenses incurred in attending the trial thereof in an action on the bond given by such landowners upon the making of the restraining order, where such expenses were not pleaded.

State, ex rel. v. Allen, 160, 169 (5).

3. *Enjoining Collection of Drainage Assessments.—Intervention by Construction Commissioner.—Right to Expenses.—Statute.*—As a commissioner in charge of construction of drainage ditch is neither a necessary nor a proper party, under §6144 Burns 1914, Acts 1907 p. 508, to owner's action to restrain the enforcement of the collection of assessments, where the commissioner intervened to defend such action he was not entitled to recover his expenses of the litigation in an action on the injunction bond.

State, ex rel. v. Allen, 160, 168 (2).

4. *Restraining Collection of Drainage Assessments.—Action on Injunction Bond.—Rights of Contractor.*—As a drainage contractor and subcontractor have an interest in the collection of assessments to pay the cost of a drainage ditch they are constructing, they were proper parties to a suit by landowners to enjoin the collection of assessments, and were entitled to recover, under proper allegation and proof, on the injunction bond executed by such owners for the payment of all damages and costs which might accrue by reason of the restraining order secured by them.

State, ex rel. v. Allen, 160, 168 (4).

5. *Temporary Restraining Order.—Expiration.*—When a temporary restraining order is issued until a fixed date, and the party is given leave on that day to move for a temporary injunction, but no further action is taken, the temporary restraining order expires on the date fixed.

Ross v. Fetter, 58, 61 (1).

6. *Temporary Restraining Order.—Expiration.*—An order restraining defendant from harvesting or disposing of certain wheat until notice and further order of the court, it being ordered that defendant be notified that an application for a temporary injunction would be heard on a day named, did not fix a definite limit as to when the restraining order should expire, so that, in the absence of further action, it did not expire on any fixed date.

Ross v. Fetter, 58, 61 (2).

INJURIES—

See MASTER AND SERVANT; MUNICIPAL CORPORATIONS 2; NEGLIGENCE 5; STREET RAILROADS.

Personal, contract of settlement with insane person, validity, see INSANE PERSONS.

INNKEEPERS—

1. *Common-Law Lien.—Goods in Possession of Guests.*—By the adoption of the common law as part of the law of Indiana, innkeepers acquired the right to assert the common-law lien upon goods brought into the inn by a guest for board and lodging furnished the latter at his request, even though the goods were not the property of the guest, provided the innkeeper is not aware

INNKEEPERS—Continued.

- of such fact, the proviso, however, not being applicable under all circumstances where the guest was the agent or servant of the owner of the goods. *Nicholas v. Baldwin Piano Co.*, 209, 211 (1).
2. *Right to Lien on Baggage of Guest.—Abrogation of Common Law.*—The enactment of §§7848-7850 Burns 1914, Acts 1897 p. 123, as amended, Acts 1911 p. 187, for the protection of innkeepers, abrogated the common-law lien in their favor, and restricts the property to which an innkeeper's lien may attach to that owned by the person creating the debt.
- Nicholas v. Baldwin Piano Co.*, 209, 213 (4).

INSANE PERSONS—

- Release for Personal Injuries.—Validity.—Absence of Judicial Determination.*—A contract of settlement for personal injuries made by an employer with a servant of unsound mind, but who has not been judicially so determined, is voidable only.
- Haskell, etc., Car Co. v. Logermann, Admrs.*, 69, 75 (5).

INSOLVENCY—

See **BANKS AND BANKING.**

INSTRUCTIONS—

See **TRIAL 12-32.**

INSURANCE—

See also **EVIDENCE 5; PLEADING 3; TRIAL 8.**

1. *Accident.—Actions on Policies.—Defenses.—Matters Provable Under General Denial.*—In an action on an accident policy, causes of and causes contributing to the death of insured, other than that pleaded, and the alleged fact that insured knowingly inhaled the sewer gas that caused his death, are provable under the general denial. *Massachusetts Bonding, etc., Co. v. Free*, 275, 278 (3).
2. *Accident.—Actions on Policies.—Complaint.—Cause of Death.*—In an action on an accident policy, an averment in the complaint that insured, while at work, was poisoned by the accidental, involuntary and unconscious inhalation of sewer gas, which poisoned his system to such an extent that he died from the same, is sufficient to withstand demurrer on the ground that it did not show that death resulted solely from the involuntary and unconscious inhalation of sewer gas.

Massachusetts Bonding, etc., Co. v. Free, 275, 277 (1).

3. *Fraternal.—Policy.—Construction.—“Loss of Four Fingers on Either Hand by Severance.”*—Under a provision in the constitution of a fraternal beneficiary association providing for indemnity “in case of loss of four fingers on either hand by severance,” the insurer would be required to pay the stipulated indemnity where there is loss by severance of any material part of each of the four fingers on one hand, whenever because of such severance each of the fingers is left practically useless.

Travelers Protective Assn. v. Brazington, 130, 132 (1).

4. *Foreign Guaranty Company.—Actions Against.—Jurisdiction.*—Where a foreign bonding company maintains an office and agency in the State of Indiana, it is, under §4798 Burns 1914, Acts 1901 p. 375, subject to process served in actions begun in Indiana, relating not only to business within the state, but also growing out of other matters as well.

Ransburg v. U. S. Fidelity, etc., Co., 304, 309 (4).

INSURANCE—Continued.

5. *Fire.—Loss.—Demand for Appraisal.—Offer of Compromise.—Effect.—Waiver.*—A suggestion of the possibility of an avoidance of an appraisal by compromise, contained in a letter from insurer to insured, demanding an appraisal and naming an appraiser, which letter also contained the express statement that the suggestion should not be taken as a waiver of the demand, is not sufficient to excuse the insured from appointing an appraiser within the period designated by §4622g Burns 1914, Acts 1911 p. 525. *Commercial Union, etc., Co. v. Schumacher*, 526, 542 (12).
6. *Fire.—Loss.—Admission by Insured.—Right of Parties to Demand Appraisal.*—Where, under the provisions of §4622g Burns 1914, Acts 1911 p. 525, the insurer has, in a suit on the policy, filed a good, partial answer of admitted loss, it is not a good reply thereto that the insurer did not seasonably demand in writing an appraisal, since the insured cannot complain of the failure of the insurer to exercise a right common to both parties. *Commercial Union, etc., Co. v. Schumacher*, 526, 544 (14).
7. *Fire.—Loss.—Appraisement.—Default.—Actions.—Maturity of Claim.*—Under a policy governed by §4622g Burns 1914, Acts 1911 p. 525, and containing a provision postponing the maturity of any claim thereunder for sixty days after the receipt by the company of an award by appraisers when appraisal has been required, the effect of the statute is to provide an effective means of ascertaining the amount of loss under such policy in order to meet such requirement, and, according as the insured or the insurer falls when required by the opposite party to designate an appraiser within the time provided in the statute therefor, the loss admitted by the insurer or the loss claimed in the preliminary proof by the insured becomes the ascertained loss and is recoverable by suit at the expiration of sixty days from such default. *Commercial Union, etc., Co. v. Schumacher*, 526, 540 (10).
8. *Fire.—Contracts.—Statute Part of Contract.—Construction.*—When a statute is, by its terms, part of an insurance policy, such statute is to be construed to effectuate the purpose of its enactment, and the meaning of such policy is to be ascertained from all its provisions in their entirety and not from a literal or technical construction of isolated or special clauses, the general rule being to construe an insurance contract liberally in behalf of the insured, so as to effectuate its purpose, resolving doubts in his favor. *Commercial Union, etc., Co. v. Schumacher*, 526, 539 (9).
9. *Fire.—Contract.—Waiver of Appraisal.—Maturity.—Pleading.*—Under a policy of insurance postponing the maturity of a claim for a fire loss until sixty days after notice, ascertainment, estimate and satisfactory proof of loss have been received by the company, including an award by appraisers when appraisal has been required, a complaint that alleges a loss by fire, and due notice and proof thereof, and that defendant, upon demand, failed and refused to join in making said proof, ascertainment or estimate of loss and refused to pay anything on account thereof, in effect charges a waiver on the part of the company of its right to an appraisal, and sufficiently shows that the claim is due and unpaid. *Commercial Union, etc., Co. v. Schumacher*, 526, 533 (5).
10. *Fire.—Loss.—Demand for Appraisal.—Receipt of Letter.*—A demand by insurer addressed to insured's attorney, for an appraisement, and naming an appraiser, would not operate to cause

INSURANCE—Continued.

the running of the five-day period provided by §4622g Burns 1914, Acts 1911 p. 525, until the insured actually received the letter, in the absence of any showing that his attorney had authority to open the letter or to receive notice of such demand and appointment.

Commercial Union, etc., Co. v. Schumacher, 526, 542 (11).

11. *Fire.—Misrepresentation by Insured.—Knowledge Chargeable to Insurer.—Pleading.*—A reply to an answer of material misrepresentations in procuring the policy, as to the facts concerning the horse-power, catalogue price, purchase price and whether new or second-hand, of the automobile insured, which alleges that the agents of defendant inspected the car to learn the facts as to all such matters, and that with such knowledge they applied for and obtained the policy for the plaintiff, sufficiently charges the defendant with knowledge of such facts when issuing the policy. *Commercial Union, etc., Co. v. Schumacher*, 526, 535 (6).

12. *Fire.—Misrepresentations by Insured.—Waiver After Knowledge.*—A reply sufficiently states a waiver of alleged misrepresentations charged by answer to have been made by the insured in procuring the policy, where it avers knowledge of such misrepresentations on the part of the insurer at the time of issuing the policy, and a retention of the premium for more than a year, the term of the policy, and until after the action was brought upon the policy in which such answer and reply were filed, and where such reply alleges that the tender then made was not made within a reasonable time after knowledge of the facts and of the loss. *Commercial Union, etc., Co. v. Schumacher*, 526, 536 (7).

13. *Fire.—Waiver of All Defenses.—Knowledge.—Action.*—A reply of waiver of all defenses, set up to an answer of misrepresentations in procuring the policy, is bad when there is no allegation in such reply of any knowledge by the insurer of such misrepresentations by insured at the time the alleged acts constituting the claimed waiver were done, since a waiver is an intentional relinquishment of a known right, or conduct that warrants an inference thereof, an election to forego some advantage that could have been taken or insisted upon, and, knowledge of the right, charged to have been waived, is an essential to such waiver.

Commercial Union, etc., Co. v. Schumacher, 526, 543 (13).

14. *Life.—Action.—Complaint.—Allegations of Performance of Conditions.—Sufficiency.*—Where a life policy provided that a failure to furnish proof of the death of insured within one year thereafter should be a conclusive bar to recovery thereon, the insurer's liability did not attach *ipso facto* upon the death of the insured, but depended on the furnishing of such proof by some one on behalf of the insured or his beneficiary, and, in an action on such policy, an allegation in the complaint that insured had performed all the conditions of the policy is insufficient to show that the required proof of death had been furnished.

Federal Life Ins. Co. v. Barnett, Adm., 613, 630 (5).

15. *Life.—Action.—Failure to Furnish Proof of Death.—Finding of Fact.—Sufficiency of Evidence.*—In a beneficiary's action on a life policy against a reinsurer, where plaintiff had in her possession the policy sued on, the reinsurance policy, and letters to insured, which gave sufficient information to enable her to have furnished proof of death as required by the policy, there was no legal excuse for failure to furnish such proof and the action could not be maintained.

Federal Life Ins. Co. v. Barnett, Adm., 613, 647 (17).

INSURANCE—Continued.

16. *Life.—Action.—Instructions.—Right of Forfeiture.—Waiver.*—Where a fraternal society's by-laws provided for a forfeiture of a policy if a member should become intemperate in the use of intoxicating liquors, or if his death should result directly or indirectly from his use thereof, an instruction, in an action on an insurance contract issued by such society that, if insured died from the intemperate use of intoxicating liquors, and if defendant, knowing of such use, continued to accept the assessments stipulated in the policy, defendant was liable, was erroneous, since the acceptance of such assessments with knowledge of insured's use of intoxicating liquors did not constitute a waiver of the right to defend on the ground that insured's death resulted from the intemperate use of intoxicants.
Modern Woodmen v. Stone, 601, 603 (1).
17. *Life.—Action.—Insured's Knowledge of Reinsurance Contract.—Evidence.*—In a beneficiary's action on a life policy against a reinsurer, evidence held insufficient to show that insured, at the time he received the reinsurance policy issued to him by the reinsurer, and at all times thereafter, was ignorant of the terms of the reinsurance contract.
Federal Life Ins. Co. v. Barnett, Adm., 613, 637 (15).
18. *Life.—Action.—Reply Not Supporting Complaint.—Sufficiency.*—In an action on a policy of life insurance, where the complaint alleged that insured fully performed all the terms and conditions of the policy, and a paragraph of reply admitted that he did not so perform and alleged a waiver of performance, the reply was subject to demurrer on the ground of departure.
Federal Life Ins. Co. v. Barnett, Adm., 613, 635 (11).
19. *Life.—Action.—Representations in Application.—When Fraudulent.—Evidence.*—In an action on a life insurance policy, defended on the ground that insured was a habitual drunkard, evidence that insured was drunk when solicited for the insurance and that the soliciting agent filled out the application and the check in payment of the premium, when considered in connection with undisputed facts relative to insured's habits as to the use of intoxicants, held sufficient to justify the jury's finding that insured's conduct in making false answers in his application as to the use of intoxicants and the condition of his health was not fraudulent.
Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 150 (3).
20. *Life.—Avoidance of Policy.—Representations in Application.*—Where the acts of insured, a habitual drunkard, in obtaining a policy of insurance were not fraudulent, and the insurer's agent had knowledge of the facts that otherwise would have avoided the policy, the representations of insured that he did not use alcoholic beverages to excess and had not been treated for illness in any hospital, etc., did not invalidate it.
Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 150 (4).
21. *Life.—Action.—Representations by Insured on Application.—Insurer's Knowledge.—Evidence.*—In an action on a policy of life insurance, defended on the ground that insured was a habitual drunkard at the time he applied for the insurance, evidence held to warrant the jury in finding that the insurer had knowledge of insured's condition.
Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 149 (2).
22. *Life.—Contract.—Failure to Make Proof of Death.*—In a beneficiary's action against a reinsurer on a life policy issued by the

INSURANCE—Continued.

Federal Life Ins. Co. v. Barnett, Adms., 613, 634 (8). original insurer, providing that "the company must be furnished at its office in the city of Indianapolis with proof of death," within one year, the failure of plaintiff to furnish proof of death within the time required by the policy is not sufficiently excused because the reinsurer did not maintain an office in the State of Indiana, to plaintiff's knowledge.

23. *Life.—Contract.—Proof of Death.—Failure to Make.*—The instantaneous death of insured would not constitute an act of God, excusing failure to make proof of death within the time stipulated in an insurance policy.

Federal Life Ins. Co. v. Barnett, Adms., 613, 634 (9).

24. *Life.—Contract.—Validity.*—The parties to a life insurance contract had a right to agree that "the company must be furnished at its office in the city of Indianapolis with proof of death," within a year, and that a failure to do so should be a conclusive bar to any recovery on the policy, and it was the duty of insured to have informed his beneficiary, or some other person, of the existence of the policy, and of such condition so that the proofs of death could be furnished.

Federal Life Ins. Co. v. Barnett, Adms., 613, 632 (6).

25. *Reinsurance.—Action.—Failure to Pay Premiums.—Finding of Fact.—Sufficiency of Evidence.*—In a beneficiary's action on a life policy against a reinsurer, evidence held insufficient to sustain a finding that insured refused to recognize the reinsurance contract as binding and that his failure to pay premiums was because defendant demanded a premium greatly in excess of the amount charged in the original policy.

Federal Life Ins. Co. v. Barnett, Adms., 613, 638 (16).

26. *Life.—Forfeiture.—Self-Executing By-Laws.*—Where a beneficial association's constitution is in such terms as to render it self-executing, the society need not take affirmative action against a member in order to declare a forfeiture, but the right to benefits is lost immediately upon the default which by the constitution forfeits rights to benefits. *Oleske v. Piotrowski*, 136, 140 (1).

27. *Life.—Policy.—Construction.—Condition as to Proof of Death.—Necessity of Compliance.*—Contracts of insurance, when of doubtful meaning or when open to two constructions, are to be construed against the insurance company, but where the contract plainly requires that some one on behalf of insured make proof of insured's death within a stipulated time, nothing less than an act of God will excuse failure to make such proof, and unless such proof is made or waived, the right of action is forfeited where the policy so provides.

Federal Life Ins. Co. v. Barnett, Adms., 613, 633 (7).

28. *Life.—Society's Constitution.—Construction.*—The terms "those left behind" and "the family," as used in a provision of a beneficial association's constitution that suicide of a member deprives such groups of death benefits, are broad enough to include the wife of a member. *Oleske v. Piotrowski*, 136, 140 (2).

29. *Reinsurance.—Action on Original Policy.—Complaint.—Necessity of Setting Out Reinsurance Contract.*—In a beneficiary's action on an original life policy against a reinsuring company to recover a personal judgment against the reinsurer, in the absence of a reinsurance policy having been issued to insured, the contract of reinsurance is the foundation of the cause of action, and

INSURANCE—Continued.

must be made a part of the complaint in order to authorize a personal judgment against defendant, since its liability rests on the contract of reinsurance.

Federal Life Ins. Co. v. Barnett, Adm., 613, 627, 628 (1).

30. *Reinsurance.—Action Against Reinsurer.—Complaint.—Allegations as to Reinsurance Contract.*—In an action by the beneficiary of a life policy against a reinsurer, in the absence of a reinsurance policy, the complaint must allege directly whether the contract of reinsurance was oral or written, and, if written, a copy thereof must be made part of the complaint.

Federal Life Ins. Co. v. Barnett, Adm., 613, 629 (3).

31. *Reinsurance.—Consent of Insured in Mutual Company.—Statute.*—The provision of §4753 Burns 1914, Acts 1897 p. 318, that no contract reinsuring the risks of a mutual company can be entered into unless authorized and approved by two-thirds of the policyholders attending a meeting for that purpose, renders inapplicable, in such cases, the rule that a policyholder is not bound by a reinsurance contract, because he is not a party to it and is without voice in its making.

Federal Life Ins. Co. v. Barnett, Adm., 613, 636 (13).

32. *Reinsurance.—Liability of Reinsurer.—Rights of Insured.*—Though generally the liability of the reinsurer is solely to the reinsured, it is competent for the reinsurer to make the reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions allowing a third party to maintain an action on a contract made for his benefit he may recover directly from the reinsurer.

Federal Life Ins. Co. v. Barnett, Adm., 613, 630 (4).

33. *Reinsurance Contract.—Rights of Policy-Holder or Beneficiary.*—A reinsurance contract between defendant and the insurer of plaintiff's intestate entered into under §4753 Burns 1914, Acts 1897 p. 318, and made for the benefit of the policyholders of the latter company, entitles a policyholder, or in event of his death, his beneficiary to maintain an action on such reinsurance contract.

Federal Life Ins. Co. v. Barnett, Adm., 613, 628 (2).

INTENTION—

See WILLS.

Of parties, determination of kind of contract, see SALES 13.

INTERROGATORIES—

Special, motion for judgment on, see APPEAL 30.

INTESTACY—

Partial, construction to avoid, see WILLS 4.

INTOXICATING LIQUORS—

Unlawful sale, action on dealer's bond after satisfaction by joint-tortfeasor, see RELEASE.

INTOXICATION—

Effect on injured defendant's rights, see STREET RAILROADS 1.

JOINDER

In error, when necessary, see APPEAL 55.

JUDGES—

Special, powers in foreclosure proceedings, see **MORTGAGES** 3.

JUDGMENT—

See also **APPEAL** 8, 10, 68, 114; **DIVORCE** 3.

1. *Collateral Attack.—Void Judgment.*—Though a judgment is erroneous, it is not subject to collateral attack, unless it is void.
State, ex rel. v. Farmers, etc., Bank, 216, 222 (2).
2. *Conclusiveness.*—A judgment against the receiver of an insolvent bank to the effect that the judgment should be paid to the judgment creditor, and should be preferred and paid out of any assets in the hands of the bank in preference to any claims of the bank's creditors, was conclusive as between the same parties in the same court, or in any other court of concurrent jurisdiction, in any subsequent proceeding involving priority of claims, such judgment not having been appealed from.
State, ex rel. v. Farmers, etc., Bank, 216, 222 (3).
3. *Default.—Relief.—Excusable Neglect.*—Where the service of summons is sufficient and the return thereof unquestioned, a foreign corporation cannot urge as ground for relief from judgment by default under §135 of the Code of Civil Procedure, §405 Burns 1914, that its agent upon whom the summons was served and one of whose duties was to forward immediately copies of any process served upon him as agent of the company, had neglected to do so.
Hartford Fire Ins. Co. v. Applebaum, 514, 517 (2).
4. *Divorce.—Alimony.—Scope of Issues.—Presumptions.*—It is the duty of the court in the trial of divorce proceedings to make inquiry as to the amount of property owned by the parties and as to how the title was held, and to make the decree for alimony justified by the circumstances, and there is a presumption that the court performed those duties.
Wagner v. Treesh, 551, 554 (4).
5. *Final Judgment.—What Constitutes.—Action for Injunction.*—Where, in an action for an injunction, there was a trial upon the issues, evidence was heard, and there was a general finding for defendant and plaintiff was adjudged liable for costs, such judgment was "final," so that defendant could sue on the injunction bond given by plaintiff, a judgment being final if it at once disposes of the entire controversy, settling the rights of the parties and leaving nothing for further consideration.
Ross v. Felter, 58, 62 (3).
6. *Motion in Arrest.—Insufficiency of Complaint.—Failure to Raise Questions by Demurrer.—Statute.*—In an action for personal injuries, where defendant failed to present the question by demurrer whether the first paragraph of complaint showed that plaintiff was guilty of negligence proximately causing his injury, the right to raise that question by a motion in arrest of judgment is denied by §344 Burns 1914, Acts 1911 p. 415, and there was no error in overruling the motion.
Pittsburgh, etc., R. Co. v. Boys, 102, 111 (4).
7. *Persons Concluded.—Appearance.*—An English corporation named as defendant in the caption of the complaint, and which appeared and answered without denying the execution of the policy sued on which purported to have been issued by it, is bound by the judgment rendered, although there was an allega-

JUDGMENT—Continued.

tion that such corporation was organized under the laws of England and of New York and Illinois.

Commercial Union, etc., Co. v. Schumacher, 526, 532 (4).

8. *Validity.—Reformation of Bond.—Service by Publication.*—Where two of plaintiff's employes, who signed a fidelity bond as principals, embezzled funds belonging to plaintiff, and he brought action on the bond against the surety company wherein he also sought reformation of the bond, where the employes were made parties and duly notified of the action by publication, such service will authorize a judgment against them reforming the instrument, though it will not support a personal judgment.

Ransburg v. U. S. Fidelity, etc., Co., 304, 310 (6).

JURISDICTION—

Appellate, see **APPEAL** 1, 2, 55.

JURY—

Untrue answers to interrogatories, not misconduct, see **NEW TRIAL** 2.

Exhibits, inspection, see **TRIAL** 4.

Questions for, see **BENEFICIAL ASSOCIATIONS**; **CARRIERS** 3, 6; **CHATTEL MORTGAGES** 4; **EXECUTORS AND ADMINISTRATORS** 1; **NEGLIGENCE** 2; **REFPLEVIN**; **TRIAL** 30.

Taking case from jury, see **TRIAL** 8-11.

LABOR—

See **MASTER AND SERVANT**.

LANDLORD AND TENANT—

Lease.—Rent.—An agreement whereby a life tenant was to receive as rent a fixed share of the crop raised, such rental to be harvested and delivered to her by the tenants at gathering time, was a lease and the relation between the parties was that of landlord and tenant.

Jennings v. Hembree, Admr., 370, 374 (3).

LAST CLEAR CHANCE—

Application of doctrine, see **CARRIERS** 8, 11; **NEGLIGENCE** 9; **RAILROADS** 6; **TRIAL** 17.

LEASES—

See **LANDLORD AND TENANT**; **MINES AND MINERALS**.

LIENS—

See **CHATTEL MORTGAGES**; **MORTGAGES**; **MECHANICS' LIENS**.

Goods in guests' possession, see **INNKEEPERS**.

For attorney's fees, recovery, see **ATTORNEY AND CLIENT**; **CLERKS OF COURTS**.

LIFE ESTATES—

Death of Life Tenant.—Rents Not Due.—Remainder.—Rent stipulated in favor of a life tenant, in the form of a fixed share of crop growing at her death, and not to be delivered until some

LIFE ESTATES—Continued.

months thereafter, is annexed to the real estate and goes to the remainderman. *Jennings v. Hembree, Admr.*, 370, 374 (4).

LIFE INSURANCE

See **INSURANCE**.

LIMITATION OF ACTIONS—

1. *Statute.—Operation.—Continuous Contract May Be Express or Implied.*—In determining the question whether a contract of hire was continuous, as affecting the running of the statute of limitations, it makes no difference whether the contract was express or implied. *Weesner, Admr., v. Weesner*, 237, 240 (1).
2. *Statute.—Operation.—Continuity of Contract of Hire.—How Determined.*—The test of "continuity" of services rendered so as to take a case out of the operation of the statute of limitations does not depend so much upon continuous day-by-day performance, but rather upon whether all the services were performed under one contract, either express or implied, with no definite time fixed for payment, or whether they were rendered under several separate contracts. *Weesner, Admr., v. Weesner*, 237, 241 (5).

LIVE STOCK—

Sale, breach of warranty, measure of damages, etc., **SALES** 15, 16.
Shipment, negligence, action, see **CARRIERS** 6.

MARRIAGE—

1. *Age.—Consent of Parents.—Fraud.*—The mere fact that a girl was but sixteen years old and was married without the consent of her parents would not render the marriage void, notwithstanding the statute requiring parental consent, but such youthfulness is an important allegation in support of the charge of fraud. *Christlieb v. Christlieb*, 682, 686 (3).
2. *Annulment.—Conflict of Laws.*—The fact that the parties were married in Michigan can be no defense of a suit for annulment for fraud, brought in Indiana. *Christlieb v. Christlieb*, 682, 688 (5).
3. *Annulment.—Fraud.—Public Policy.—Pleading.*—Where the complaint averred that the marriage sought to be annulled had never been consummated by cohabitation, the rule against considering the alleged misrepresentations to a girl sixteen years old, as to character, previous marriage, children, etc., as such fraud as goes to the fundamentals or essentials of the marital relation, does not apply, but public policy would seem to require an annulment of the marriage, and all such allegations, taken together, state a cause of action for fraud and authorize the annulment of the marriage. *Christlieb v. Christlieb*, 682, 687 (4).
4. *Fraud, Voidable.—Equity.—Jurisdiction.*—A marriage procured by fraud is voidable at the suit of the injured party, and courts having the jurisdiction of courts of equity have jurisdiction to annul a marriage on account of fraud under their general powers to annul fraudulent contracts. *Christlieb v. Christlieb*, 682, 685 (2).

MASTER AND SERVANT.

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|-----------------------------------------------------|--------------------------------------|
| I. THE RELATION, 1. | III. INJURIES TO THIRD PERSONS, 4-6. |
| II. INJURIES TO SERVANT—NEGLIGENCE—LIABILITY, 2, 3. | IV. WORKMEN'S COMPENSATION, 7-25. |

I. THE RELATION.

1. *Evidence*.—Where the only evidence of relationship between defendants is that one had sold the other an automobile, retaining title and the right to retake possession until the price was fully paid, there is not a particle of evidence to show that the buyer was the servant of the seller in the operation of the machine in a separate taxi business of his own, over which the seller had no control.
Coonse v. Bechold, Admx., 663, 665 (2).

II. INJURIES TO SERVANT—NEGLIGENCE—LIABILITY.

2. *Action.—Complaint.—Sufficiency*.—In an action against the master for the death of a servant due to the alleged negligent operation of a wood-working machine, complaint under the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), held sufficient as against demurrer for want of facts.
Haskell, etc., Car Co. v. Logermann, Admx., 69, 73 (2).
3. *Jury Question.—Evidence*.—In an action for the death of a motorman, held that, in view of §2, Acts 1911 p. 145, §8020b Burns 1914, and there being a complication of facts and a difference of opinion as to the inferences derivable therefrom, the question of decedent's negligence was for the jury, under the principles of the common law as well as by the express provision of §7 of the act.
Public Utilities Co. v. Reader, Admx., 485, 489 (5).

III. INJURIES TO THIRD PARTIES.

4. *Action.—Relation of Master and Servant*.—In an action for injuries to a third person negligently caused by the driver of a motor truck, who together with the truck was furnished by the owner of the truck to the defendant at a fixed sum per week, to be used in delivering goods sold by it, and were actually so engaged when the injuries were inflicted, where the owner of the truck gave no orders at any time relative to said deliveries, nor as to the method, process or routing of the same, and where the driver made the deliveries from sales slips and orders received from the shipping clerk of defendant, held to sustain the verdict in so far as concerns its included finding that the driver at the time of the injury was the servant of defendant.
Sargent Paint Co. v. Petrovitzky, 353, 370 (3).
5. *Negligence of Servant.—Determination of Relation*.—Where the owner of a motor truck, by oral arrangement, furnishes the truck and its driver to another by the week, for the purpose of delivering goods sold by such other, and the driver negligently injures a third person while making such deliveries, the true test in determining who the master was, is who had the right to control and direct the servant in the performance of the work.
Sargent Paint Co. v. Petrovitzky, 353, 359 (1).
6. *Relation of Master and Servant.—Question for the Jury*.—Where the owner of a motor truck by oral arrangement rents the truck with a driver to another at a fixed weekly rental, to be used in making deliveries of goods sold by such other, and retains and exercises no control over the process of delivery, and the driver negligently injures a third person while making such

MASTER AND SERVANT—Continued.

deliveries, the question of who is the master liable for the injury is one of fact for the jury.

Sargent Paint Co. v. Petrovitzky, 353, 368 (2).

IV. WORKMEN'S COMPENSATION.

7. *Accident Arising in the Course of Employment.*—An employe may be said to receive an injury by accident arising in the course of his employment, within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, when it occurs within the period of the employment, at a place where he may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment.

Nordyke, etc., Co. v. Swift, 176, 185 (7).

8. *"Accident Arising Out of and in Course of Employment."*—*Construction.*—The words, "by accident arising out of and in the course of the employment," as used in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, should be given a broad and liberal construction to effectuate the humane purposes of the act.

Nordyke, etc., Co. v. Swift, 176, 182 (4).

9. *Accident Arising Out of and in Course of Employment.*—*Deviation from Custom.*—*Presumption.*—Where a janitor was killed by a charged wire while preparing to procure gasoline with which to clean floors, the accident resulting in death arose out of and in the course of the employment within the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, even though he was deviating from the usual custom by arranging to use clean gasoline instead of dirty gasoline, it being presumed in the absence of a finding to the contrary, that deceased was exercising a reasonable discretion in the discharge of his duties under the circumstances.

Nordyke, etc., Co. v. Swift, 176, 183 (5).

10. *Accident Arising in Course of Employment.*—*Duties Within Employment.*—Where a janitor, who customarily used dirty gasoline to clean factory floors, was electrocuted while preparing to obtain clean gasoline for that purpose, the act of procuring clean gasoline, even if it had never previously been used to clean the floors, was the performance of an act reasonably connected with the janitor's work, and this would be true although decedent, in attempting to procure clean gasoline, was disobeying an order theretofore given him, such disobedience bearing not on the question whether decedent's injury was received by accident arising out of and in the course of his employment, but only on the question of wilful misconduct.

Nordyke, etc., Co. v. Swift, 176, 185 (8).

11. *Agreement as to Compensation.*—The employer cannot complain of an agreement for compensation, duly approved and being performed under the Workmen's Compensation Act, on the ground that such agreement is incomplete in that it makes no provision for the injured employe during any possible period of partial disability.

Home Packing, etc., Co. v. Cahill, 245, 247 (1).

12. *Agreement as to Compensation.*—*Conclusiveness.*—*Setting Aside.*—An agreement which has been made under and in compliance with the Workmen's Compensation Act, which has been approved by the Industrial Board, and under which payments have been made, cannot be set aside on the petition of the em-

MASTER AND SERVANT—Continued.

ployer and his insurer, based on the general ground that the injury did not arise out of and in the course of the employment, where petitioners do not claim that there was any mistake as to any specific fact but merely seek to challenge their conclusion as to this element of the agreement, since the agreement is a confession of liability and has by the board's approval the force and effect of an award.

Home Packing, etc., Co. v. Cahill, 245, 248 (3).

13. *Appeal.—Decisions Reviewable.*—As §81 of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918) provides for an appeal to the Appellate Court only from an award by the full board, where the record discloses an award by less than the full board, an appeal is unauthorized and must be dismissed.

Galvin v. Brown, 30, 34 (4).

14. *Appeal.—Dismissal.*—As an appeal to the Appellate Court from an allowance of fees for applicant's attorney is unauthorized under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), it will be dismissed, even though the question is not raised by appellee.

Galvin v. Brown, 30, 34 (3).

15. *Appeal.—Enforcing Award.*—An appeal from a ruling by the Industrial Board, denying employer's petition to set aside an agreement for compensation and ordering a resumption of payments thereunder, does not challenge the power of the board to make the order of resumption on the ground that the sole power to enforce an award rests in the circuit court.

Home Packing, etc., Co. v. Cahill, 245, 248 (2).

16. *Applicant's Attorney's Fee.—Right to Review.*—Under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), no appeal is authorized from an order of the Industrial Board fixing the amount of attorney's fee due applicant's attorney for services rendered in securing an award.

Galvin v. Brown, 30, 34 (2).

17. *Award.—Review by Full Board.—Award by Majority.—Validity.*—In a proceeding for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), providing that where an award is made by fewer than all the members of the Industrial Board, the party dissatisfied may, by making application within seven days, have a hearing "before the full board," and that an "award of the full board shall be conclusive and binding as to all questions of fact, but that either party to the dispute may within thirty days from the date of the award appeal to the Appellate Court for errors of law," where an award of compensation was made by one member of the board and the employer obtained a hearing by the full board, an award after such hearing made and signed by only a majority of the board is valid and binding. *Root Dry Goods Co. v. Gibson*, 77.

18. *Concurrent Contracts of Employment.—Measure of Liability for Injury.*—Where one doing janitor service for different persons, under separate, concurrent contracts, known to each, was injured so that he died while so engaged for one of them, his dependents are entitled under §§37 and 38 of the Workmen's Compensation Act (Acts 1919 pp. 164, 165) to compensation from the employer for whom decedent was engaged when injured, based upon the total earnings regularly received from all such employers.

In re Howard, 557, 563 (2).

MASTER AND SERVANT—Continued.

19. *Disobedience of Orders by Workman.—Acquiescence.—Effect.*—Where an employer acquiesced in the violation of an order as to the means to be used by employees in doing certain work, the order was thereby nullified. *Nordyke, etc., Co. v. Swift*, 176, 181 (2).
20. *"Employment."—Words and Phrases.*—The word "employment," as used in clause (c) of §76 of the Workmen's Compensation Act (Acts 1915 p. 392), means the general occupation in which the employee was engaged when he received his injury.
In re Howard, 557, 563 (1).
21. *Findings by Industrial Board.—Inferences.*—In proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the Industrial Board, in determining what its finding should be is authorized to draw reasonable inferences from the facts established and the circumstances shown by the evidence. *Nordyke, etc., Co. v. Swift*, 176, 181 (3).
22. *Industrial Board.—Findings.—Conclusiveness.*—The findings of the Industrial Board are conclusive upon the Appellate Court only when sustained by the evidence.
Centlivre Beverage Co. v. Ross, 343, 349 (2).
23. *Loss of Testicle.—Functions and Earning Capacity Unimpaired.*—The loss of a testicle, unaccompanied by any impairment of any physical function, or by any disability to work is not a permanent partial disability under the last paragraph of §31 of the Workmen's Compensation Act.
Centlivre Beverage Co. v. Ross, 343, 350 (3).
24. *Permanent Disability.—Evidence.*—The last paragraph of §31 of the Workmen's Compensation Act covers only injuries that cause some permanent partial disability that effects some diminution of earning power and, to sustain an award thereunder, there must be findings of such disability and diminution, and such findings must be supported by the evidence.
Centlivre Beverage Co. v. Ross, 343, 346 (1).
25. *Scope.—Construction.*—The Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, does not limit compensation to cases where an injury is received by an employee while he is performing his work in the usual and customary manner or in the way he was directed and an employee who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself, or his dependents, of a right to compensation, if injured while so engaged.
Nordyke, etc., Co. v. Swift, 176, 184 (6).

MATERIALMEN—

Right to lien, see **MECHANICS' LIENS.**

MECHANICS' LIENS—

1. *Materialmen.—Right to Lien.*—Where a materialman furnished materials to a person who had a contract to construct the house in which they were to be used and who was engaged exclusively in the general contracting business, the materialman had a right to a mechanic's lien, as such person was a contractor and not a materialman. *Wood v. Isgrigg Lumber Co.*, 64, 68 (3).
2. *Materialmen.—Submaterialmen.—Right to Lien.*—A dealer or materialman who furnishes material to another materialman has no right to a mechanic's lien on the property improved.
Wood v. Isgrigg Lumber Co., 64, 68 (2).

MECHANICS' LIENS—Continued.

3. *Notice.—Time for Filing.—Estoppel of Owner.*—The date of repainting fixes the time for the beginning of the period within which to file a notice of mechanic's lien, where the work contracted for had been fully done more than sixty days prior thereto, but had been refused by the lessee as incomplete and the repainting demanded, since it will be assumed that the lessee acted in good faith, and, although its contentions were wrongful, it is estopped from claiming, in a suit to enforce rights conferred by the lien, that the contract was in fact completed in the first instance. *W. P. Nelson Co. v. Weyl, Rec.*, 674, 681 (2).
4. *Right to Lien.—Corporations.—Statutes.—"Persons."*—Under §8295 Burns 1914, Acts 1911 p. 62, providing that "all persons performing labor or furnishing materials, etc.," may have a mechanic's lien, a corporation may acquire a lien for materials. *Wood v. Isgrigg Lumber Co.*, 64, 65 (1).

MEMORANDUM—

To demurrer, review, see **APPEAL** 61, 63.

MINES AND MINERALS—

1. *Oil Leases.—Gas Well Clauses.—Two Constructions Possible.—Rules of Construction.*—If an oil and gas lease is susceptible to two constructions the courts lean to that one which will effect a reasonable result upon the lease as a whole, adopting generally the construction against the lessee and favorable to the lessor, and resolving all doubts in favor of the latter, except where the parties have adopted a construction, when such construction will be applied. *Ohio Oil Co. v. Burch*, 313, 316 (2).
2. *Oil Leases.—Gas Well Clauses.—"Gas Only."—What Constitutes Gas Well.—Evidence.*—In an action by lessor against lessee upon a lease for oil and gas for the money rental fixed for a gas well in addition to the free use by lessor of gas therefrom, "if gas only is found, in sufficient quantities to transport," a finding that the well was a gas well only, was sustained by evidence that, when the well was drilled in, the escaping gas could be heard a mile away, that gas was furnished to lessor by lessee free of charge and was also transported and used to operate other leases by lessee through lines from which third parties used gas for domestic purposes, and that it was called a gas well by lessee's pumper, although when first drilled in it produced three barrels of oil a day which had diminished to one-fourth of a barrel per day. *Ohio Oil Co. v. Burch*, 313, 317 (3).
3. *Oil Leases.—Gas Well Clauses.—Free Use by Lessee.—Construction.*—Any construction of a lease that would permit the lessee to use gas from a well involved in excess of the amount required to operate the lease, free of charge, is to be avoided as inequitable and as not expressing the intention of the parties. *Ohio Oil Co. v. Burch*, 313, 316 (1).

MINISTERIAL ACTS—

Approval of bond, see **DEPOSITORIES**.

Personal liability for negligence, see **OFFICERS** 5; **SCHOOLS AND SCHOOL DISTRICTS** 2, 4.

MISCONDUCT—

Of counsel, see **APPEAL** 105.

Of jury, untrue answers, not sufficient to support charge, see **NEW TRIAL** 2.

MISREPRESENTATIONS—

By insured, pleading knowledge of insurer's agents, sufficiency, see **INSURANCE** 11-13.

MONEY PAID—

Debt of Another.—Voluntary Payment.—Agreement to Repay.—Evidence of a ratification and of a promise to repay will support an action for reimbursement for money voluntarily paid to discharge the taxes of another. *Dull v. Bank of Redkey*, 352.

MORTGAGES—

See also **BOUNDARIES** 3; **CHATTEL MORTGAGES**.

1. *Assistance, Writ of.—Pleading.—Cross-Complaint.*—In a proceeding for a writ of assistance to put the purchaser under foreclosure in possession, a cross-complaint seeking to quiet the title to the real estate involved was properly stricken out.

Brackney v. Boyd, 592, 599 (7).

2. *Foreclosure.—Assistance, Writ of.—Petition.—Sufficiency.*—A proceeding for a writ of assistance to obtain possession of real estate after sale under foreclosure of mortgage is summary, being supplemental to and a part of the foreclosure proceedings and to give full effect thereto, and since it is not based on any written instrument, the petition need not set out the sheriff's deed nor a copy of the notice of the application for the writ.

Brackney v. Boyd, 592, 597 (2).

3. *Foreclosure.—Judges.—Special Judges.—Assistance, Writ of.*—The powers of a special judge in mortgage foreclosure proceedings extend to putting the purchaser at the sale in possession by writ of assistance.

Brackney v. Boyd, 592, 599 (6).

MOTIONS—

See **NEW TRIAL**.

In arrest, see **JUDGMENT** 6.

To reinstate, time for filing, see **APPEAL** 59.

To make specific, see **APPEAL** 75, 106; **PLEADING** 6, 7.

MUNICIPAL CORPORATIONS—

1. *City Treasurer.—Collection of Delinquent Assessments.—Fees.*—Under §1 of the act of March 9, 1909 (Acts 1909 p. 454), providing that in cities of the fifth class, where the county treasurer acts as city treasurer he shall receive, in addition to his salary, five per cent. of the amount of all delinquent city taxes collected by him for the city, and §2 of the act of March 12, 1907 (Acts 1907 p. 550, §8720 Burns 1914), providing that all other provisions of the law relating to the collecting and accounting for state, county, township, road, city school, and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments in cities of the class referred to in the act, which embraces cities of the fifth class, a county treasurer who was acting treasurer of a city of the fifth class was entitled to receive, for services rendered by him in collecting delinquent assessments for public improvements, a sum equal to five per cent. of the amount so collected.

City of Jeffersonville v. Scheer, 206.

2. *Defective Sidewalk.—Personal Injuries.—Contributory Negligence.*—Since the enactment of §362 Burns 1914, Acts 1899 p. 62, contributory negligence is a matter of defense in an action

MUNICIPAL CORPORATIONS—Continued.

against a city for personal injuries caused by a defective sidewalk. *City of New Albany v. Stallings*, 232, 236 (2).

3. *Public Highway.—Establishment by User.*—Where a landowner used an adjoining strip of land as a public highway for more than twenty years, he was entitled to the continued use thereof on the doctrine of user, although the land was situated within a city, as the doctrine of user is applicable to land within cities and towns, as well as without. *Downer v. Griffith*, 693, 697 (3).
4. *Sidewalks.—Defects.—Observation.*—A traveler has the right to assume that city sidewalks are reasonably safe for travel; and though he must use his faculties for observation in an ordinary and reasonable way proportionate to the dangers apprehended, this does not require an active search for defects, nor a constant expectation of danger, and he is not necessarily guilty of negligence as matter of law in failing to observe an open defect, especially when his attention is diverted by some sufficient cause. *City of New Albany v. Stallings*, 232, 236 (1).
5. *Sidewalks.—Personal Injuries.—Contributory Negligence.*—In an action for personal injuries from a fall occasioned by a loose brick and hole between bricks in a sidewalk, where the plaintiff did not see the loose brick or know of the hole, but was giving her attention to a vegetable display along the sidewalk, which was one traveled as much or more than any other in the city, the question of contributory negligence was one of fact for the jury. *City of New Albany v. Stallings*, 232, 237 (4).
6. *Sidewalks.—Personal Injuries.—Negligence.*—In an action for personal injuries from a fall occasioned by a defective condition of a sidewalk used as much as any other in the city, where it consisted of bricks, loosely laid without sand or other filler, on a slope two feet long, descending five or six inches, where by the ordinary use of the sidewalk spaces of two to three inches were occasioned between the bricks, and such condition had existed for several weeks, negligence on the part of the city was a question of fact for the jury. *City of New Albany v. Stallings*, 232, 237 (3).
7. *Streets.—Location of Place of Injury.—Evidence.*—In an action against a city for personal injuries sustained from a defect in a street, the location of such defect within the corporate limits of the city may be shown by the testimony of the plaintiff. *City of Indianapolis v. Byrne*, 243.

NEGLECT—

Excusable, default, relief, see JUDGMENT 3.

NEGLIGENCE—

See also APPEAL 78, 86; CARRIERS; DEATH; EVIDENCE 2; MASTER AND SERVANT; MUNICIPAL CORPORATIONS 2, 4-7; OFFICERS 5; PLEADING 15; RAILROADS; STREET RAILROADS.

1. *Automobiles.—Liability of One Not Present.*—There can be no recovery for negligent operation of an automobile against one not present, and having nothing to do with the operation of the automobile, except on the theory that the operator was his servant. *Coonse v. Bechold, Adm.*, 663, 664 (1).
2. *Common Law.—Jury Question.*—Common-law negligence is always a failure to use due care, of which the jury are the judges, and therefore always a question of fact for the jury. *Lake Erie, etc., R. Co. v. Douglas*, 567, 579 (7).

NEGLIGENCE—Continued.

3. *Contracts.—Provision Against Extra Hazard.*—A contract between the owner of a threshing outfit and another for the use of the outfit, may lawfully contain a stipulation against liability arising from the increased hazard in the use of wood instead of coal in the engine for fuel, since such a provision did not lessen the responsibility of the thresher for the results of actual negligence in the use of such fuel. *Arthur v. Stults*, 451, 453 (3).
4. *Fire from Threshing Engine.—Evidence.*—In an action for loss of a barn by fire alleged to have been communicated by a threshing engine operated without a spark-arrester, evidence that the engine was equipped with one of approved type, of common use, in proper place on the engine, and in good condition before and after the fire, together with evidence that the fire broke out inside the barn, 200 feet from the engine, and that one of plaintiff's employes was seen smoking in the barn not long before, is sufficient to support a finding that the fire was not caused by sparks from the engine, although there be other evidence conflicting therewith. *Arthur v. Stults*, 451, 453 (1).
5. *Pleading.—Contributory Negligence.—Statute.*—In view of §362 Burns 1914, Acts 1899 p. 58, plaintiff in an action for personal injuries need not allege his own freedom from fault, but a complaint will be sufficient in that respect, unless the fact of contributory negligence affirmatively appears on the face of the pleading.
Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 16 (2).
6. *Theaters and Shows.—Dangerous Structures.—Failure to Discover Conditions.*—One who owns or controls a place of public entertainment must know that the place is safe for public use, and use care and diligence to keep it safe; and want of knowledge of defective conditions discoverable in the use of ordinary care will not excuse him from liability for injuries occasioned by his neglect.
Adams v. Schneider, 249, 259 (7).
7. *Theaters and Shows.—Dangerous Structures.—Independent Contractor.*—One who owns or controls a place of public entertainment is not relieved from liability for injuries occasioned by the dangerous condition of the place by the fact that an independent contractor intervened in the preparation of such place for, or in the conduct of, an entertainment therein.
Adams v. Schneider, 249, 259 (8).
8. *Theaters and Shows.—Right of Patrons to Assume Safety of Place.*—Those who attend and pay for admission to a place of entertainment have a right to assume that a safe place has been prepared for them, and need not inspect the surroundings to determine whether they are safe.
Adams v. Schneider, 249, 259 (9).
9. *Wrongful Death.—Action.—Instructions.—Last Clear Chance.—Pleading.*—In an action for wrongful death, instructions on the theory of last clear chance are proper under a general allegation of negligence without pleading the last clear chance doctrine where the facts developed by the evidence warrant it.
Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 22 (21).

NEW TRIAL—

See also APPEAL 6, 22, 23, 30, 66; PARTIES.

1. *Correct Result.—Faulty Instructions.*—Where the verdict is right according to the principles applicable to the facts, it is not

NEW TRIAL—Continued.

contrary to law though it may be contrary to some instruction given, since the instruction may be wrong.

Public Utilities Co. v. Reader, Adm., 485, 486 (7).

2. *Interrogatories to Jury.—Untrue Answers.—Not "Misconduct of Jury."*—An allegation in a motion for new trial that a jury made incorrect or untrue answers to certain interrogatories returned with the general verdict, will not constitute a charge of misconduct of the jury within the meaning of the statute authorizing new trials upon such ground.

New York Central R. Co. v. Reidenbach, 360, 393 (1).

3. *Quiet Title.—Cross-Complaint.—Motion for New Trial on Part of Issues.—Effect.*—In a suit to quiet title, where a cross-complaint to quiet the title to and for possession of part of the lands involved has been filed, a new trial cannot be granted upon the cross-complaint only, where there has been a finding against the defendant thereon, although there was also a finding against the plaintiff upon the complaint. *Prinz v. Grayson*, 375, 376 (2).

NOTES—

See **BILLS AND NOTES**.

NOTICE—

See **MECHANICS' LIENS** 3.

Of appeal, waiver, see **APPEAL** 17, 18.

Of freight rates, effect, see **CARRIERS** 1.

Necessity, in sale under mortgage, see **CHATTEL MORTGAGES** 3.

OBSTRUCTION—

Of stream, action, evidence, see **WATERS AND WATERCOURSES**.

OFFICERS—

1. *Boards.—Appeal.*—In statutes authorizing appeals from administrative officers and administrative boards, the word "appeal" is used in a special and restricted sense.

Board, etc. v. First Nat. Bank, etc., 290, 295 (2).

2. *Boards.—Appeal to Circuit Court.—Finality of Action.*—Where an appeal is authorized from an administrative officer or board to the circuit court, the action of that court is final unless an appeal therefrom is specifically authorized or unless the proceeding in that court is of such a character as to bring it within the general provision of the Code of Civil Procedure authorizing appeals from final judgments.

Board, etc. v. First Nat. Bank, etc., 290, 296 (3).

3. *Discretionary Acts.—Immunity from Personal Liability.*—A duty is discretionary when it rests with the officer to determine whether he should perform a certain act, and if so, in what way; and, in the absence of corrupt motives, he is not liable for the exercise of such discretion. *Adams v. Schneider*, 249, 255 (2).

4. *Liability on Official Bonds.—Breach of Official Duty.*—Recovery cannot be had on an official bond unless a breach of an official duty is affirmatively shown. *State, ex rel. v. Bleeke*, 23, 26 (1).

5. *Ministerial Acts.—Personal Liability for Negligence.*—The duties of an officer in the performance of an act which he has, in the exercise of a discretionary power, determined shall be done, are ministerial, and for negligence in the performance thereof, which results in injury, he may be liable.

Adams v. Schneider, 249, 255 (3).

OIL LEASES—

See MINES AND MINERALS.

OPINIONS—

See EVIDENCE 11.

PAROL—

See EVIDENCE 10.

PARTIES—

Drainage commissioner, not necessary nor proper party in action to enjoin assessments, see DRAINS; INJUNCTION 3.

Necessary, in action on fidelity bond, see PRINCIPAL AND SURETY.

Defect.—Remedy.—Waiver.—Action on Bond of Liquor Dealer.—Motion for New Trial.—That an administratrix is not a proper party plaintiff in an action on a liquor dealer's bond is ground for demurrer to the complaint, and if not so presented is waived and cannot be raised by motion for new trial.

Brown v. Kemp, Adma., 281, 283 (1).

PARTITION—

Action by Tenant in Common.—Parol Contract for Sale of Land.—An action by a tenant in common against a cotenant for partition of the land cannot be defeated by proof that plaintiff had orally agreed to sell her interest to such cotenant in possession and that the purchase price had been paid, where such contract could not be enforced because it was within the statute of frauds.

King v. Hartley, 1, 9 (4).

PASSENGERS—

See CARRIERS 8-16.

"PERSONS"—

Usage in statute, construction, see MECHANICS' LIENS 4.

PLEADING—

Rulings on, review, see APPEAL 27, 61, 63, 65, 67, 74, 75.

Action against reinsurer, necessity of setting out reinsurance contract, see INSURANCE 29, 30.

In particular actions or proceedings, see also the specific topics.

1. *Admissions.—Failure to Deny Allegations of Complaint.*—In an action against a foreign company on a fidelity bond, where the complaint alleged that defendant was maintaining an office and agency in the State of Indiana, it is admitted by failure to deny that defendant was authorized to transact business in the state, and that process might be served upon its authorized agent, as provided in §4798 Burns 1914, Acts 1901 p. 375.

Ransburg v. U. S. Fidelity, etc., Co., 304, 309 (3).

2. *Amendment.—Discretion of Court.*—The permitting of amendments to pleadings so as to make them conform to the facts proved is a matter largely within the discretion of the trial court.

O. H. Maloney & Co. v. Whitney, 157, 160 (2).

3. *Complaint.—Accident Insurance.—Actions on Policies.—Averment Controlled and Aided by Provisions of Policy.*—In an action on an accident policy, an averment that death resulted from insured being poisoned by the accidental, involuntary and unconscious inhalation of sewer gas, which poisoned his system so that he died, was controlled and aided by a statement in the policy that the company would pay if loss of life resulted solely from

PLEADING—Continued.

- the involuntary and unconscious inhalation of gas or other poisonous vapor.
Massachusetts Bonding, etc., Co. v. Free, 275, 277 (2).
4. *Complaint.—Amending to Conform to Evidence.*—The fact that the issues are changed by an amendment of the complaint to make it conform to the evidence is no reason why the amendment should not be permitted.
Cleveland, etc., R. Co. v. Locke, 35, 39 (1).
5. *Complaint.—Amendment Before Judgment.—Discretion of Trial Court.*—In an action to recover for building materials and on an open account, the trial court did not abuse its discretion in allowing plaintiffs, before judgment was rendered, to amend the complaint to make it include items previously claimed by them to have been paid, but which the court, in another case between the same parties being tried at the same time, held had not been paid.
O. H. Maloney & Co. v. Whitney, 157, 160 (4).
6. *Complaint.—Ruling on Motion to Make Specific.*—In an action to recover for automobile hire, which was shown by bill of particulars filed with the complaint to have consisted of twenty separate items, the date of each being given, the denial of defendant's motion to make the complaint more specific held not seriously prejudicial to defendant, so as to justify a reversal.
Lake Co. Agri. Society v. Verplank, 186, 188 (3).
7. *Complaint.—Ruling on Motion to Make Specific.*—In an action for wrongful death, where each paragraph of the complaint, when considered as an entirety, so definitely pleaded defendant's negligence that the precise nature of the charge could not be misunderstood, there was no reversible error in overruling defendant's motion to make the complaint more specific.
Haskell, etc., Car Co. v. Logermann, Adms., 69, 72 (1).
8. *Complaint.—Theory.—Variance.*—A plaintiff cannot sue on one theory and recover on another, since any recovery must be upon the theory of the complaint. *State, ex rel. v. Bleeke*, 23, 26 (2).
9. *Conclusions.—Effect in Absence of Motion to Require Facts.—Tender.*—An allegation that a tender was not made within a reasonable time is a conclusion, but is sufficient, under §343a Burns 1914, Acts 1913 p. 850, in the absence of a motion to require the statement of the facts necessary to support it.
Commercial Union, etc., Co. v. Schumacher, 526, 536 (8).
10. *Conclusions.—Legal Effect of Facts Pleaded.*—A conclusion of the pleader as to the legal effect of transactions before stated adds nothing to the pleading.
Union Traction Co. v. Ross, Rec., 473, 475 (1).
11. *Counterclaim.*—In an action on promissory notes given for the purchase price of a piano and the use of a copyrighted scheme to increase the sales of defendants, who were merchants, paragraphs of answer setting up that sales were not increased as guaranteed by plaintiffs held to state a counterclaim and not a defense.
Loveland v. McCormick, 172, 175 (2).
12. *Counterclaim.—Demurrer.—Form and Requisites.*—A demurrer to paragraphs of answer stating a counterclaim on the ground "that neither of said paragraphs state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated therein" is insufficient, since a demurrer to a counterclaim for want of facts should take the same form as a

PLEADING—Continued.

demurrer to a complaint on that ground, which is, under the statute, that the complaint does not state facts sufficient to constitute a cause of action. *Loveland v. McCormick*, 172, 175 (3).

13. *Departure.—What Constitutes.*—A reply must support the complaint, and a violation of this rule constitutes a departure which must be attacked by a demurrer.

Federal Life Ins. Co. v. Barnett, Adms., 613, 635 (10).

14. *Exhibits.—Effect.—Insurance.*—An allegation in a complaint on a policy that defendant is a corporation duly organized under the laws of three separate jurisdictions is mere matter of description and is controlled by the policy, made part of and an exhibit to the complaint, as to the identity of the insurer.

Commercial Union, etc., Co. v. Schumacher, 526, 532 (3).

15. *General Averment.—Street Railroads.—Negligence.*—The general averment that defendant "then and there by its agents and servants carelessly and negligently ran said electric car upon and against plaintiff" will withstand demurrer for want of facts in the absence of contradictory specific allegations.

Louisville, etc., Traction Co. v. Cotner, 377, 379 (2).

16. *Matters Provable Under General Denial.—Special Answers.—Demurrer.*—Paragraphs of answer filed with a paragraph in general denial, and setting up only matters provable thereunder, are demurrable.

Massachusetts Bonding, etc., Co. v. Free, 275, 278 (4).

POLICIES—

See INSURANCE.

POSSESSION—

See ADVERSE POSSESSION.

Sufficiency of, to take oral purchase of realty out of statute, see FRAUDS, STATUTE OF 2.

PRESUMPTIONS—

See EVIDENCE; STATUTES 2; TRIAL 38.

On appeal, see APPEAL 67-73.

PRINCIPAL AND AGENT—

See also CHATTEL MORTGAGES, 1, 2; HUSBAND AND WIFE 5; SALES 9.

PRINCIPAL AND SURETY—

Plea of suretyship by divorced wife, effect, see HUSBAND AND WIFE 7.

1. *Action on Fidelity Bond.—Necessary Parties.—Defrauding Employer.—Jurisdiction.—Statute.*—Where a bonding company, maintaining an office and agency in the State of Indiana, executed a fidelity bond in the State of Ohio wherein it agreed to reimburse assured for any loss sustained by fraud or dishonesty of named employes in that state, and such employes embezzled funds of assured, the bonding company, a nonresident, could not, in view of §4798 Burns 1914, Acts 1901 p. 375, providing for service on such companies, defeat an action on the bond, brought in the State of Indiana, on the ground that, as the defrauding employes, principals in the bond, were primarily and essentially liable, and defendant bonding company had an office in Ohio, and as such employes had never been residents of Indiana, territorial

PRINCIPAL AND SURETY—Continued.

jurisdiction was dependent on the residence of the principals immediately liable, so that the Indiana court, in the absence of such principals, who had been notified of the action by publication and failed to appear, would not have jurisdiction in a suit against the surety alone.

Ransburg v. U. S. Fidelity, etc., Co., 304, 308 (2).

2. *Release of Surety.—Common-Law Rule.—Technical Release.*—At common law a release of one surety releases all the sureties, but the instrument relied upon to have this effect must be an instrument under seal, and, if not under seal, it is construed as a covenant "not to sue," which is personal to the parties thereto, and operates as a release of the party to whom given, but not of a cosurety.

First Nat. Bank, etc. v. Mayr, 81, 88 (1).

PROCESS—

Service, foreign corporation, jurisdiction, see **INSURANCE 4**.

Sheriffs and Constables.—Special Deputies.—A sheriff has power to appoint a person to serve a particular summons, and the fact that such person is not appointed as a general deputy and does not take the oath of deputy sheriff does not of itself render invalid service so made.

Hartford Fire Ins. Co. v. Applebaum, 514, 517 (1).

PROFITS—

As element of damage, rule, see **SALES 1-5**.

PROMISSORY NOTES—

See **BILLS AND NOTES**.

PUBLIC POLICY—

Annulment of fraudulent marriage, see **MARRIAGE 3**.

QUIETING TITLE—

See **EQUITY 2**; **MORTGAGES 1**; **NEW TRIAL 3**.

RAILROADS—

See also **APPEAL 98**; **CARRIERS**; **PLEADING 15**; **STREET RAILROADS**; **TRIAL 1, 2, 13-22, 24-27, 30, 31**.

1. *Crossing Accident.—Contributory Negligence.—Ability to Hear Train Immediately Before Entering upon Track.—Answers to Interrogatories.*—A verdict for the plaintiff in a crossing accident case is not overthrown by an answer to an interrogatory that if the injured person had listened she could have heard the train coming immediately before she drove on the crossing, since the general verdict is taken as a finding that she could not have heard the noise of the train in time to have avoided injury.
Chesapeake, etc., R. Co. v. Perry, 506, 511 (7).
2. *Crossing Accidents.—Contributory Negligence.—Evidence.*—Where there was evidence that a railroad crossing was too narrow to permit the passage of a separator, and that the stalling of the separator on the track was not due to the condition of the lugs on its drive wheels, the jury was justified in finding the plaintiff not guilty of contributory negligence in stalling upon the track. *New York Central R. Co. v. Reidenbach*, 390, 394 (4).
3. *Crossing Accident.—Contributory Negligence.—Evidence.—Instructions.*—An instruction on the subject of contributory negli-

RAILROADS—Continued.

gence in a railroad crossing accident case that directs the jury to consider all facts and circumstances in evidence should have been limited to the facts and circumstances existing or occurring prior to the time of the collision.

Lake Erie, etc., R. Co. v. Douglas, 567, 580 (9).

4. *Crossing Accidents.—Evidence.—Sufficiency.*—In an action for damages sustained by a girl seventeen years of age, by being struck by a train while driving a buggy over a crossing, a verdict for the plaintiff is binding upon the Appellate Court upon the questions of negligence, contributory negligence and proximate cause, where there is evidence that the engineer cut off steam some distance away and approached the crossing at thirty to thirty-five miles an hour, that the statutory crossing signals were not given, that an electric gong at the crossing did not ring and was and for some time had been in bad working order, that the view in the direction of the approaching train was obstructed, that the girl approached the crossing at a reasonable rate of speed, looking and listening continuously for the approach of a train in either direction and for signals thereof, that she knew of said gong and observed it was not ringing, but did not fully rely upon that and continued to look and listen for other signals of an approaching train, but neither heard nor saw any nor discovered the approach of the train until her horse was entering on the track, when she made a vain effort to avoid the collision. *Chesapeake, etc., R. Co. v. Perry, 503, 508 (1).*

5. *Crossing Accidents.—Injury to Passenger in Automobile.—Liability.—Contributory Negligence.*—One riding as a passive guest in another's automobile, which was struck by an interurban car on a public highway crossing, was not chargeable with contributory negligence. *Marion, etc., Traction Co. v. Reese, 223.*

6. *Crossing Accident.—Last Clear Chance.*—Paragraph of complaint held good on the theory of last clear chance owing to the allegations of the surroundings of the parties, their being unconsciously in danger and of the knowledge of that fact by the engineer running the colliding passenger train.

Lake Erie, etc., R. Co. v. Douglas, 567, 575 (2).

7. *Crossing Accidents.—Negligence.—Evidence.*—Evidence held to justify a finding that the employes in charge of the approaching train negligently failed to observe the obstruction of the crossing by plaintiff's separator being stalled thereon, and to stop the train in time to prevent the injury.

New York Central R. Co. v. Reidenbach, 390, 395 (5).

8. *Crossing Accidents.—Obstructions to View.—Instructions.*—In an action for injuries at a railroad crossing, evidence of things obscuring the view of approaching trains was proper to be considered by the jury in determining whether the plaintiff had exercised reasonable care for her own safety, and an instruction advising the jury that such evidence was to aid them in determining the degree of care and caution necessary on the part of the defendant should have been so limited.

Lake Erie, etc., R. Co. v. Douglas, 567, 580 (8).

9. *Crossing Accident.—Smoke and Noise.—Pleading.*—In an action for damages for injury by collision, a paragraph of complaint examined and held to state a cause of action on the theory that owing to smoke and noise produced by a passing train, the statutory signals, if given, of the approach of the colliding train, were

RAILROADS—Continued.

imperceptible, and for failure to give other warning of the approach of the train and approaching at an excessive rate of speed under such circumstances.

Lake Erie, etc., R. Co. v. Douglas, 567, 574 (1).

10. *Crossing Accident.—Warning.—Negligence.—Evidence.—Admissibility.*—In a crossing accident case, under proper averments in the complaint, evidence that an electric gong at the crossing, designed and placed to give warning of the approach of trains to the crossing, was out of repair five or six days before the accident, is admissible to show that the gong had been out of order for such a length of time that defendant, by the exercise of ordinary care, might have had it repaired.

Chesapeake, etc., R. Co. v. Perry, 506, 513 (8).

11. *Street Railroads.—Crossings.—Maintenance.—Conclusions of Law.*—A conclusion of law awarding to a railroad the full amount of its expense in repairing a street railroad crossing is erroneous, in view of the provisions of §§5676, 5677 Burns 1914, Acts 1901 p. 461.

Union Traction Co. v. Ross, Rec., 473, 477 (3).

12. *Street Railroads.—Crossings.—Maintenance Contracts.—Privility.—Consideration.—Statutory Rights and Duties.*—A contract between a railroad and a street railroad for a crossing in a city street, whereby the owner of the street railroad agreed to maintain such crossing at its own expense and to the approval of the railroad, is not enforceable when pleaded in an action between successors in ownership of the two roads to recover the cost of repairs made by the railroad to the street crossing involved unless facts be pleaded showing privity of contract or of estate on the part of the defendant with the contracting owner of the street railroad company, nor where the facts pleaded show that the promise of maintenance in the contract was without any sufficient consideration and, under such circumstances §§5676, 5677 Burns 1914, Acts 1901 p. 461, fixed the rights and duties of the parties.

Union Traction Co. v. Ross, Rec., 473, 475 (2).

RATES—

Schedule, binding force, see CARRIERS 1.

RATIFICATION—

Of voluntary payment of taxes, effect, see MONEY PAID.

REAL ESTATE—

See ADVERSE POSSESSION; BOUNDARIES; FRAUDS, STATUTE OF; LANDLORD AND TENANT; LIFE ESTATES; VENDOR AND PURCHASER.

RECORD—

Preparation and contracts, see APPEAL 20-26.

REFORMATION OF INSTRUMENTS—

Fidelity Bond.—Action for Reformation.—Necessary Parties.—In an action to reform a fidelity bond, employes who signed the bond as principals are necessary parties.

Ransburg v. U. S. Fidelity, etc., Co., 304, 310 (5).

REHEARING—

See APPEAL 60.

RELEASE—

Of surety, effect on other sureties, common-law rule, see **PRINCIPAL AND SURETY 2**.

1. *Intoxicating Liquors.—Unlawful Sales.—Actions on Bond of Liquor Dealer.—Satisfaction by Joint Tort-Feasor.*—After an administratrix, by authority of the probate court, has accepted satisfaction from and executed a release from liability to a railroad company for the killing of her decedent, she cannot proceed against a retail liquor dealer for unlawful sales causing intoxication resulting in such killing by a train, under the bond required by §8323g Burns 1914, §4, Acts 1911 p. 244.

Brown v. Kemp, Adms., 281, 289 (3).

2. *Retail Liquor Dealer's Bond.—Actions.—Torts.*—An action on the bond of a liquor dealer required by §8323g Burns 1914, §4, Acts 1911 p. 244, sounds in tort and is subject to the rule that there can be but one satisfaction for the damages, if any, sustained.

Brown v. Kemp, Adms., 281, 285 (2).

RELEVANCY—

See **EVIDENCE**.

REMAINDER—

Contingent or vested, construction, see **WILLS 5, 6**.

REMAINDERMEN—

Death of life tenants, rights as to rents not due, see **LIFE ESTATES**.

RENT—

See **LANDLORD AND TENANT**.

As element of damage, see **DAMAGES 2**.

Rights of remaindermen to rents not due on death of life tenant, see **LIFE ESTATES**.

REPLEVIN—

See also **APPEAL 73**; **EVIDENCE 11**.

Jury Questions.—Sufficiency of Demand.—In an action in replevin to recover wiring, cable terminals, and other telephone equipment installed in a hotel building, question whether plaintiffs made sufficient demand for equipment in controversy held for the jury.

Meeker Hotel Co. v. Forgan, 199, 202 (3).

REPLY—

Departure from complaint, effect, see **PLEADING 13**.

RESCISSION—

Burden of proof, see **VENDOR AND PURCHASER 1**.

Question of fact, see **CONTRACTS**.

RES GESTAE—

See **EVIDENCE 2, 5**; **TRIAL 7**.

RES JUDICATA—

See **DIVORCE 1, 3**.

RULES OF COURT—

Preparation of briefs, see **APPEAL 32-54**.

Venue, change, filing, see **TIME**.

SALES—

See also EVIDENCE 1; FRAUDS, STATUTE OF; TRIAL 11; VENDOR AND PURCHASER.

1. *Action for Breach of Contract.—Damages.—Profits.—Correctness of Award.*—Where, upon breach of an executory contract of sale by failure to deliver, it happens that the actual damages sustained do not substantially differ from the aggregate of lost profits, the amount awarded will not necessarily be erroneous or excessive because of such fact.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 423 (5).

2. *Actions for Breach of Contract.—Damages.—Profits.*—Generally, the consideration of future profits, upon the question of damages for the breach of an executory contract of sale by failure to deliver, is excluded, because such profits are uncertain of realization, are contingent upon things collateral to the contract, and cannot be said to have been within the contemplation of the parties when the contract was made.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 422 (2).

3. *Actions for Breach of Contract.—Damages.—Profits.—When Admissible.*—Where future profits may be ascertained with reasonable certainty and the loss of them is a proximate result of a breach of a contract of sale by failure to deliver, or where the facts show with reasonable certainty that such future profits were contemplated by the parties when the contract was entered into, they may properly be considered in estimating the damages.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 422 (3).

4. *Actions for Breach of Contract.—Damages.—Profits.—Measure of Damages.*—While, in some cases, the amount of future profits lost by failure to deliver goods under a contract of sale may afford the most satisfactory means of ascertaining the actual damages occasioned by such breach, such profits are not to be taken for the measure of damages, but are only to be considered in connection with the other evidence on the question in estimating the damages that naturally and proximately resulted from the breach of contract.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 422 (4).

5. *Actions for Breach of Contract.—Goods Bought for Resale in Established Trade.—Profits.*—Where a vendor of shoes to be manufactured according to specifications knew that the buyer had an established trade on such shoes at certain prices, such knowledge supplied the reasonable certainty of profits requisite to their consideration as an element of damages for the breach of the contract of sale by failure to deliver.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 428 (6).

6. *Actions for Breach of Contract.—Goods Unobtainable Elsewhere.—Measure of Damages.—Actual Loss.—Retail Price.*—Where the manufacturer broke a contract for the sale of shoes to a retailer at a time when there was no market at which, or dealer from whom, shoes of the particular brand, make and quality could be obtained, the actual loss was the measure of damages, and the price at which, in the due course of business, they could have been sold by the purchaser may be considered in assessing such damages.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 435 (7).

7. *Actions for Breach of Contract.—Measure of Damages.*—Ordinarily, the amount recoverable upon breach of an executory contract of sale by failure to deliver the articles bargained for, of

SALES—Continued.

the kind, quality, or quantity designated, at the time and place for delivery, is the difference between the contract price and the market value at the time and place for delivery.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 419 (1).

8. *Action for Purchase Price.—Complaint.—Sufficiency.*—In an action to recover the value of an ice box, complaint alleging that defendant purchased the box from plaintiff at an agreed price, and that said sum was due and unpaid, *held* sufficient as against the objection that it failed to allege that title passed to defendant.

Beaven v. Hamilton, 141, 144 (1).

9. *Agent to Sell at Retail.—Sales at Wholesale.*—Power to sell at retail does not authorize a sale at wholesale.

Cathcart v. Dalton, 650, 655 (4).

10. *Conditional Sales.—Rights of Parties.*—Where the owner of personal property sells and delivers it to a purchaser, not for the purpose of consumption or resale, at an agreed price payable at a future day, upon the express condition and agreement that the title to the property shall remain in the vendor until the purchase price is fully paid, the vendee, prior to payment, can neither sell nor incumber the property so as to defeat the vendor's title.

Partlow, etc., Car Co. v. Stratton, 122, 126 (1).

11. *Contract.—Correspondence.—Meeting of Minds.—Acceptance Deviating from Offer.*—No contract was formed by an order of goods to be delivered prior to June 1 "as ordered out by me," accepted "for scattered shipment February to May, inclusive," for want of meeting of the minds of the parties, since the order called for delivery when ordered out and in quantities ordered out by its maker prior to June 1, while the acceptance intended that a certain amount should be shipped out each month.

Shane Bros. v. Barrett, 331, 332 (3).

12. *Executory Contract.—Evidence.*—In an action to recover on notes given for the purchase price of a store and to foreclose a mortgage given to secure the payment of the notes, evidence *held* to warrant the inference that the contract of sale remained executory until the execution of the bill of sale.

Aldridge v. Clasmeyer, 43, 55 (8).

13. *Executory Contract.—Title.—Intention of Parties.*—In an executory contract of sale the goods remain the property of the seller until the contract has been executed, and whether, in a particular case, there is an actual sale, or only an executory contract of sale, depends upon the intention of the parties.

Aldridge v. Clasmeyer, 43, 55 (7).

14. *Implied Warranty.—Acceptance.—Caveat Emptor.—Action for Price.—Counterclaim.*—Under a contract for the manufacture and sale of shoes, to be different from other shoes manufactured by the sellers, to have the buyer's name stamped thereon and to be of special design, pattern and grade for sale to customers acquainted with such shoes by previous purchases, all of which was known to both parties, there was an implied warranty that such shoes would be reasonably suited for such trade, and where there were defects therein that were not known to the buyer and would not have been ascertained by ordinary inspection, the buyer was not bound to return the shoes, but could keep them, and if sued for the purchase price set up his damages by way of counterclaim, since in such a case the principle of *caveat emptor* is not applicable.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 436 (8).

SALES—Continued.

15. *Sale of Cattle.—Breach of Warranty.—Measure of Damages.*—Where a seller of cattle warranted them to be sound and free from disease and the animals developed illness after the buyer had placed them with his own herd, the measure of damages in a suit for a breach of warranty, where the seller had reason to know that the purchaser intended to mingle them with other cattle owned by him, is the difference between the value of the diseased cattle, and what the value would have been at the time of sale had they been as warranted, together with the loss suffered by the purchaser from the infection of other cattle, and other reasonable expenses incurred in caring for and doctoring such cattle.
Stiefel v. Witherspoon, 192, 197 (1).
16. *Sale of Cattle.—Breach of Warranty.—Action.—Necessity of Alleging Special Damages.*—Where a seller warranted cattle to be free from disease, and after sale they developed an infection which was communicated to the buyer's herd with which they were mingled, the complaint in an action by the buyer for breach of the warranty need not particularly aver general damages, but special damages, such as those occasioned by communication of the disease to the buyer's herd, must be specially pleaded.
Stiefel v. Witherspoon, 192, 198 (2).
17. *Tailor-Made Clothing.—Implied Warranty.*—When an order is placed with a tailor for a suit of clothes for a particular individual, in the absence of a stipulation to the contrary, there is an implied agreement that such suit, when made, will be a reasonable fit for the person for whom it was ordered.
Spahr, Admr., v. Polcar, 523, 525 (2).

SCHOOLS AND SCHOOL DISTRICTS—

1. *City Schools.—Powers of School Board.—School Athletics.*—The powers conferred on city school boards are broad enough to permit such boards to arrange for the conduct of field day exercises by their schools.
Adams v. Schneider, 249, 255 (1).
2. *Clerk of School Board.—Ministerial Acts.—Personal Liability.*—The acts performed by the clerk of a city school board in having seats constructed for use by spectators at field day exercises by direction of the school board were ministerial; and, if negligently performed, he was jointly liable with the members of the board for any resulting injury.
Adams v. Schneider, 249, 258 (6).
3. *Field Day Exercises.—Members of Board.—Discretionary Acts.—Personal Liability.*—The acts of members of the school board of a city, in determining to hold field day exercises, and the manner in which they shall be conducted, were discretionary, and for injuries resulting therefrom they were not personally liable.
Adams v. Schneider, 249, 258 (4).
4. *Members of School Board of City.—Ministerial Acts.—Personal Liability.*—The acts of members of the school board of a city in preparing for field day exercises and in the general management thereof, were ministerial acts, for the negligent performance of which by themselves, by their agent, or by an independent contractor, they were personally liable.
Adams v. Schneider, 249, 258 (5).

SHERIFFS—

Power to appoint special deputies, see **PROCESS**.

SIDEWALKS—

Defective, injuries, liability, see **MUNICIPAL CORPORATIONS**.

SIGNALS—

See RAILROADS 4, 9; STREET RAILROADS 2; TRIAL 31.

SPECIAL DAMAGES—

Pleading, necessity, see SALES 16.

SPECIAL PROCEEDINGS—

Applicability of Code provisions, see APPEAL 4.

STATUTES—

Cited and construed, see p. xxi.

1. *Abrogation of Common Law.—Substitution or Repugnancy.*—An abrogation of the common law will be implied where a statute is enacted which undertakes to cover the entire subject treated and is clearly designed as a substitute for the common law, or where two laws are so repugnant that both in reason may not stand. *Nicholas v. Baldwin Piano Co.*, 209, 211 (3).
2. *Change in Common Law.—Presumption.*—It will be presumed that the legislature does not intend by the enactment of a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication. *Nicholas v. Baldwin Piano Co.*, 209, 211 (2).

STOCKHOLDERS—

See CORPORATIONS 3.

STREAMS—

Obstruction, action, see WATERS AND WATERCOURSES.

STREET RAILROADS—

See also PLEADING 15; RAILROADS.

1. *Crossings.—Intoxicated Persons.—Known Peril.*—A street railway company owes the same duty to avoid injuring an intoxicated person seen by the motorman upon the track in a position of peril as if such person were sober. *Louisville, etc., Traction Co. v. Cotner*, 377, 381 (5).
2. *Operation Outside City Limits.—Crossings.—Signals.*—A street railway company when operating its cars across public highways outside the corporate limits of a city must do so with due regard for the safety of travelers upon such highways, and while there is no statutory requirement of crossing signals against such a company, the circumstances may be such as to require some warning of the approach of cars to be given. *Louisville, etc., Traction Co. v. Cotner*, 377, 379 (3).
3. *Operation.—Excessive Speed.—Rights of Wagon Driver.—Presumption.*—One driving a wagon along street railroad tracks is required to exercise ordinary care for his own safety, but in doing so has the right to assume, in the absence of some indication to the contrary, that the street railroad will not fail to discharge the duty it owes him, and within reasonable limits to govern his conduct accordingly. *Indianapolis, etc., Traction Co. v. Senour, Adms.*, 10, 18 (10).
4. *Operation.—Use of Streets.—Rights of Railroad in Tracks.*—A street railroad company, as against the general public, has a preferential right to that portion of the street occupied by its tracks. *Indianapolis, etc., Traction Co. v. Senour, Adms.*, 10, 16 (4).
6. *Operation.—Use of Streets.—Reciprocal Rights.*—The rights of a street railway company in operating its cars along a public

STREET RAILROADS—Continued.

street and of the public traveling the street are equal, and each is bound to use ordinary care to avoid a collision.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 16 (3).

7. *Personal Injuries.—Action.—Instructions.—Construction.*—In an action against a street railroad company to recover for the death of a wagon driver struck by a car, instructions upon reasonable care *held* not to charge defendant with knowledge acquired by it after the accident, in view of an instruction stating that the question of reasonable care, with respect to both parties, depends wholly upon the situation at the time of the accident, and not upon anything known or discovered thereafter which could not with reasonable diligence have been known or discovered before.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 20 (16).

8. *Personal Injuries.—Action.—Instructions.*—In an action against a street railroad company to recover for the death of a wagon driver struck by a car, an instruction that the question of reasonable care, with respect to both parties, depends wholly upon the situation at the time of the accident, and not upon anything known or discovered thereafter which could not with reasonable diligence have been known or discovered before, *held* not misleading, considering the instructions as a whole, because failing to limit the facts and circumstances which might be considered by the jury.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 20 (17).

9. *Personal Injuries.—Action.—Instructions.—Care Required.*—In an action against a street railroad company for the death of a wagon driver who was struck by a car while driving along the car tracks after dark, instructions on the degree of care to be exercised in operating interurban cars over public streets *held* not to state defendant's duty toward decedent too broadly, notwithstanding limitations placed on the brilliancy of the headlights on interurban cars by city ordinance.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 22 (20).

10. *Personal Injuries.—Care Required.—Violation of City Ordinance by Wagon Driver.*—Although a wagon driver, who was struck by a street car, was violating a city ordinance at the time of the accident by not having a taillight on his wagon, the street car company owed him the same duty which it owed the general public.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 21 (19).

11. *Personal Injuries.—Contributory Negligence.—Driving Wagon Along Tracks.*—Where a street railroad operated along a narrow street had scraped the snow to the sides of its tracks, so that it was practically impossible for vehicles to travel the street except upon the car tracks, and such practice became a custom, the driver of a wagon was not, as a matter of law, guilty of contributory negligence in driving his wagon along the tracks after dark.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 19 (11).

12. *Personal Injuries.—Contributory Negligence.—Evidence.—Sufficiency.*—In an action against a street railroad company for wrongful death, evidence *held* sufficient to warrant the inference that a wagon struck by a car while being driven along the tracks after dark carried a taillight as required by city ordinance.

Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 17 (6).

STREET RAILROADS—Continued.

13. *Personal Injuries.—Contributory Negligence.—Failure to Carry Taillight on Wagon.—Proximate Cause.*—The failure of a wagon driver to carry a taillight on the wagon, although a violation of a city ordinance, would not defeat a recovery for personal injuries upon being struck by a street car while driving along the street car tracks, unless such negligence proximately contributed to the injury.

Indianapolis, etc., Traction Co. v. Senour, Adm., 10, 18 (7).

14. *Personal Injuries.—Contributory Negligence.—Presumption.*—A wagon driver who was struck by a street car while driving along the tracks after dark will not be presumed to have failed to look for the car that injured him, or, if he had in fact looked, to have failed to heed what he saw, where there was evidence tending to show that the wagon was struck by a car being operated at a dangerous rate of speed, while it was dark, without any lighted headlight, and without any warning of its approach.

Indianapolis, etc., Traction Co. v. Senour, Adm., 10, 18 (9).

15. *Personal Injuries.—Questions of Fact.—Contributory Negligence.*—The mere fact that the driver of a team of horses entered upon the tracks of a street railroad after dark is not negligence *per se*, the question whether such conduct was contributory negligence depending upon the surrounding circumstances and the care used.

Indianapolis, etc., Traction Co. v. Senour, Adm., 10, 17 (5).

STREETS—

See **BOUNDARIES 2, 3; MUNICIPAL CORPORATIONS.**

Use of by street railway, rights, see **STREET RAILROADS 4, 5.**

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Action on contractor's bond, necessity of filing claim, see **HIGHWAYS.**

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Vacation appeal, date, see **APPEAL 19.**

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1. *Language Used.—Construction.*—The language used by the parties in an agreed statement of fact will be given its common, ordinary meaning. *Jennings v. Hembree, Admr., 370, 374 (2).*

2. *Presumptions on Appeal.*—In a proceeding under §§579, 580 Burns 1914, §§553, 554 R. S. 1881, by agreed statement of fact, no presumption can be indulged in favor of the judgment of the trial court. *Jennings v. Hembree, Admr., 370, 372 (1).*

SUPPLEMENTARY PROCEEDINGS—

Writ of assistance, supplemental to foreclosure proceedings, see **MORTGAGES 2.**

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See **PRINCIPAL AND SURETY.**

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See also **EQUITY 2; MUNICIPAL CORPORATIONS 1.**

1. *Exemption.—Burden of Proof.*—The burden is upon one relying upon the exemption of property from taxation to show that the

TAXATION—Continued.

property comes within some class of property which the statute says is exempt.

LaFontaine Lodge, etc. v. Eviston, Auditor, 445, 449 (1).

2. *Exemption.*—“Cemetery Corporations.”—“Fraternal Associations.”—Section 4447 Burns 1914, Acts 1905 p. 185, exempts property of cemetery associations or corporations incorporated as such under the laws of Indiana, and makes no provisions concerning the property of fraternal associations.

LaFontaine Lodge, etc. v. Eviston, Auditor, 445, 450 (2).

3. *Exemption.*—*Charitable Purposes.*—Real estate owned by an Odd Fellows Lodge, the rents and profits of which go into a fund for the care of a cemetery owned and operated by the lodge in which the lots are sold without regard to fraternal connections, is not exempt from taxation under §10144 Burns 1914, Acts 1893 p. 12, as being devoted to charitable purposes.

LaFontaine Lodge, etc. v. Eviston, Auditor, 445, 451 (3).

4. *Inheritance Tax.*—*Federal Estate Tax.*—*Deductions.*—The amount paid under the provisions of the Federal Estate Tax Law of 1918 should be allowed as a reduction of the net estate upon which to base the assessment of inheritance tax under §10143a *et seq.* Burns 1914, Burns' Supp. 1918, Acts 1913 p. 79, Acts 1917 p. 367. *State v. First Calumet Trust, etc., Co., Executor, 467.*

5. *Tax Deed.*—*Regularity.*—*Burden of Proof.*—When a tax sale is relied upon to show title and the deed is not introduced in evidence, the burden is upon the holder to show the compliance with every step required by law to be taken, from the listing of the land for taxation to the delivery of the deed.

Müller v. Meadows, 337, 342 (4).

6. *Tax Deed.*—*Title.*—*Prima Facie Evidence.*—*Lack of Required Signature.*—A tax deed not witnessed by the county treasurer is not *prima facie* evidence of title under §10380 Burns 1914, Acts 1891 p. 199, §206. *Müller v. Meadows, 337, 342 (5).*

TAXES—

Voluntary payment, ratification, effect, see **MONEY PAID.**

TEMPORARY INJUNCTION—

See **INJUNCTION.**

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See **LANDLORD AND TENANT.**

In common, partition, parol contract for sale by plaintiff, effect, see **PARTITION.**

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Validity.—*Voidable Contract.*—*Administrator's Right of Disaffirmance.*—A valid tender may be made by an administrator of a decedent's estate when necessary to disaffirm a contract entered into by decedent in his lifetime.

Haskell, etc., Car Co. v. Logermann, Adm., 69, 75 (7).

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Cited, see p. xxiv.

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THEORY—

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TIME—

Computation.—Motion for Change of Venue.—Time for Filing.—

Rule of Court.—Under §1350 Burns 1914, §1250 R. S. 1881, providing that time shall be computed by excluding the first day and including the last, a motion for change of venue from the county filed on the tenth day of the month, in a case set for trial on the fifteenth, was in time under a rule of court requiring all motions for a change of venue from the county to be filed at least five days before the day set for trial.

Davidson v. Lemontree, 215, 215 (1).

TOWNS—

See MUNICIPAL CORPORATIONS.

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TRANSCRIPTS—

Admissibility, see EVIDENCE 9.

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TRIAL.

- | | |
|-----------------------------------|---------------------------|
| I. RECEPTION OF EVIDENCE, 1-7. | IV. VERDICT, 33-36. |
| II. TAKING CASE FROM JURY, 8-11. | V. TRIAL BY COURT, 37-40. |
| III. INSTRUCTIONS TO JURY, 12-32. | |

I. RECEPTION OF EVIDENCE.

Relevancy, competency, etc., see also EVIDENCE.

Review of rulings on evidence, see also APPEAL.

1. *Admissibility.—Passenger's Action for Assault.*—Where the first paragraph of complaint alleged that plaintiff, while a passenger on defendant railroad company's train, was assaulted by an employe of defendant, and the second paragraph alleged that defendant's brakeman could easily have prevented the assault, but negligently failed to do so, evidence by the plaintiff's witnesses as to the facts concerning the assault was admissible without first showing that plaintiff's assailant was a servant of the company.
Pittsburgh, etc., R. Co. v. Retz, 581, 585 (3).
2. *Evidence to Be Made Competent by Connecting Evidence.—Admission.—Failure to Introduce Connecting Evidence.—Necessity of Motion to Strike Out.*—Where the court permits the introduction of evidence on the undertaking of counsel that other evidence will be introduced to make it competent, and such connecting evidence is not produced, the proper practice is to call the court's attention to the matter and move to strike out the evidence claimed to have been erroneously admitted.
Pittsburgh, etc., R. Co. v. Retz, 581, 586 (4).
3. *Exclusion of Immaterial Uncontradicted Testimony.*—Where all three defendants had testified uncontradictedly to an immaterial circumstance, it was not improper to refuse to allow another witness for defendants to testify again to such circumstance.
Manweiler v. Truman, 658, 661 (4).

TRIAL—Continued.

4. *Exhibits.—Inspection by Jury.*—Exhibits not formally introduced in evidence are correctly excluded from inspection by the jury.
Steckbeck v. Worman, 666, 668 (2).
5. *Limiting by Instruction.—Necessity for Request.*—Where evidence is admissible under the issues for any purpose, defendant, if desiring to guard against an improper application thereof by the jury, should ask for an instruction limiting such evidence to its legitimate scope.
Chesapeake, etc., R. Co. v. Perry, 506, 513 (9).
6. *Pleadings.*—In an action to replevin an automobile truck wherein defendant in his cross-complaint claimed a lien for repairs and supplies under §8294d *et seq.* Burns' Supp. 1918, Acts 1915 p. 621, a fact alleged in the cross-complaint may properly be considered in connection with the evidence in determining the character of supplies furnished by defendant for the truck and entering into the amount of his alleged lien.
Parilow, etc., Car Co. v. Stratton, 122, 128 (2).
7. *Sales.—Actions on Breach of Contract.—Private Writings.—Res Gestae.*—It was error to exclude records kept by the vendor in the regular course of its business while engaged in manufacturing shoes, and showing all the details of the stock, manufacture and shipment thereof, for the nondelivery of part of the order for which, and for the delivery of others in a defective condition, the buyer has set up a counterclaim for damages, such records being part of the *res gestae* and competent evidence on the issue of defects in the shoes ascribed in the counterclaim to faulty manufacture.
J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 439 (11).

II. TAKING CASE FROM JURY.

8. *Directing Verdict.—Amount.—Insurance.—Actions on Policies.*—Where, in an action on a policy, there is evidence to sustain a recovery of an amount provided for by one clause of the policy, a motion to direct a verdict for a smaller sum provided for in certain contingencies by a different clause should be overruled.
Massachusetts Bonding, etc., Co. v. Free, 275, 280 (8).
9. *Directing Verdict.—Evidence.—Inferences.*—In considering a motion to direct a verdict the court must accept as true all the evidence and inferences against the one making the motion.
Massachusetts Bonding, etc., Co. v. Free, 275, 279 (7).
10. *Directing Verdict.—Evidence on All Material Allegations.*—When there is evidence on each material allegation of the complaint, a motion to direct a verdict at the close of the evidence, made by defendants, should be overruled.
Massachusetts Bonding, etc., Co. v. Free, 275, 279 (6).
11. *Direction of Verdict.—Sales.—Contract.—Action for Breach.—Failure to Establish Contract.*—In an action for the breach of an alleged contract of sale, where, under the evidence no contract of sale had been entered into between the parties, a verdict for the defendant was properly directed.
Shane Bros. v. Barrett, 331, 332 (1).

III. INSTRUCTIONS TO JURY.

Review of instructions, see also **APPEAL**, 9, 20, 21, 24, 34-36, 39, 62, 64, 70-72, 110.

TRIAL—Continued.

12. *Applicability to Evidence.*—Tendered instructions are properly refused where there is no evidence to which they are applicable.
Dawson, Rec., v. Jackman, 335.
13. *Burden of Proof.—Crossing Accident.*—In an action against a railroad for injuries at a crossing, an instruction that in effect told the jury that the railroad had the burden of showing freedom from negligence and that a showing that it had given the statutory signals under the circumstances did not relieve it of such burden, invaded the province of the jury and was erroneous.
Lake Erie, etc., R. Co. v. Douglas, 567, 579 (6).
14. *Carriers.—Unusual Delay.—Care of Shipment.*—It is not reversible error, in a case wherein under the complaint and evidence the jury may rightfully find for the plaintiff on the theory that the defendant had failed to properly care for the shipment during the period of an extraordinary delay caused by an embargo at destination, or had failed to give notice of such delay so that the consignor might protect his shipment, to refuse a requested instruction to the effect that the carrier could not be held liable for delay caused by conditions over which it had no control, especially in view of the fact that the instruction as tendered was modified to exclude the rule in cases where the carrier has knowledge of such extraordinary conditions at the time of accepting the shipment, and the shipper has none, and as modified was given, to which giving no exception was taken or, if taken, has been waived. *Pittsburgh, etc., R. Co. v. Daniels, etc., 518, 522 (3).*
15. *Carriers.—Bill of Lading.—Delivery.*—Where, in an action for negligent loss of goods by carrier, the evidence was such as to make it a question of fact whether the goods had been delivered to the plaintiff, it was error for the court to instruct the jury as matter of law that the carrier was bound to care for and guard such goods for a certain period after their arrival, under the provisions of the bill of lading, and without reference to whether such goods had been delivered.
Grand Trunk, etc., Railroad v. Glinski, 397, 400 (4).
16. *Consideration as a Whole.*—Instructions must be considered together.
Indianapolis, etc., Traction Co. v. Senour, Adms., 10, 20 (15).
17. *Directing Verdict.—Carriers.—Last Clear Chance.*—In an action for an injury to the plaintiff while negligently upon the running board of a moving street car on the side next to a contrary-bound street car approaching on the other of double tracks, a verdict for the defendant was properly directed by the court where the evidence failed to show that the motorman of the approaching car had any knowledge of the peril of plaintiff, or that he had any appreciable time within which he could have stopped his car before the injury, or that after knowledge of such peril he could have stopped his car before the injury, or that had he stopped his car the injury would have been avoided by the stopping of the car upon which plaintiff was riding.
Mulvaney v. Terre Haute, etc., Traction Co., 270, 274 (3).
18. *Damages.—General Instruction.—Duty to Tender Instruction More Specific.*—Appellant cannot complain of a correct instruction on damages, on the ground that it is too general, having failed to tender a correct instruction that was more specific.
New York Central R. Co. v. Reidenbach, 390, 396 (7).

TRIAL—Continued.

19. *Explanatory.—Construction.*—An instruction intended as explanatory of another requires that the two should be read and considered together as virtually one instruction.
Lake Erie, etc., R. Co. v. Douglas, 587, 579 (5).
20. *Incomplete Instructions.*—Where, in an action for wrongful death, an instruction which was not mandatory and did not purport to cover all matters of law involving plaintiff's right of recovery, was applicable to at least a part of the evidence, it was not erroneous by reason of the fact that it might have been made fuller, especially in view of other instructions fully covering the matter complained of.
Indianapolis, etc., Traction Co. v. Senour, Adm., 10, 21 (18).
21. *Measure of Damages.—Items Not Pleaded in Evidence.—Instruction Not Limited.*—An instruction is erroneous that authorizes the jury to assess all damages "as shown by the evidence," where evidence was heard of an item of damages not averred in the complaint.
Louisville, etc., Traction Co. v. Cotner, 377, 381 (7).
22. *Omissions.—When Element Not in Case.—Covered by Instructions Given.*—An instruction given in an action for damages to a separator at a railroad crossing, which omits the element of contributory negligence is not harmful where under the evidence the plaintiff was not guilty of contributory negligence, and where by another instruction the jury was fully instructed as to that element.
New York Central R. Co. v. Reidenbach, 390, 396 (6).
23. *Refusal.—Instructions Inapplicable to Evidence.*—It is not error to refuse a requested instruction containing elements upon which there is no evidence.
Campbell v. Carroll, 587, 591 (3).
24. *Refusal of Inaccurate Instruction.*—In a crossing accident case reversible error cannot be predicated upon the refusal to instruct that the injured person "saw whatever she might have heard had she listened," in view of the inaccuracy of the statement.
Chesapeake, etc., R. Co. v. Perry, 506, 511 (4).
25. *Repetition.—Inapplicable.*—Instructions tendered but which are erroneous or inapplicable to the evidence, or covered by other instructions so far as correct, are properly refused.
Lake Erie, etc., R. Co. v. Douglas, 587, 581 (10).
26. *Requests Properly Refused.*—It was proper to refuse requested instructions fully covered by instructions given.
Grand Trunk, etc., Railroad v. Ginski, 397, 396 (1).
27. *Requests Covered by Instructions Given.*—It is not error to refuse to give instructions covered by other instructions given.
Chesapeake, etc., R. Co. v. Perry, 506, 511 (3).
28. *Requests Covered by Other Instructions.*—It is not error to refuse requested instructions, even though correct, where they are covered by others given.
Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 150 (8).
29. *Special Defenses.—Failure of Proof.*—Giving an instruction that directed a verdict for the plaintiff, if he had established all the material allegations of his complaint, if the defendant had failed to prove the material allegations of some one of its special defenses, is reversible error, since an action may be defeated by the establishment of all the material allegations of a single good, affirmative paragraph of answer addressed to the entire complaint.
Commercial Union, etc., Co. v. Schumacher, 526, 545 (15).

TRIAL—Continued.

30. *Street Railroads.—Crossing Accidents.—Location of Plaintiff.—Question for the Jury.*—Where the evidence was conflicting as to whether the plaintiff was, when struck, standing on the highway crossing or was a trespasser on the right of way of the street railway company some distance from the crossing, his location was a question of fact for the jury, and an instruction assuming that he was upon the crossing was erroneous.

Louisville, etc., Traction Co. v. Cotner, 377, 381 (6).

31. *Street Railroads.—Crossings.—Signals.*—Where the evidence showed that the crossing on which plaintiff was alleged to have been injured outside the city limits, was, as defendant well knew, much used by pedestrians and vehicles, both day and night, and was located near a curve in appellant's tracks, an instruction that there should have been some warning of the approach of the car was not erroneous.

Louisville, etc., Traction Co. v. Cotner, 377, 379 (4).

32. *Treating Insufficient Reply as Good.*—Giving an instruction that treats an insufficient reply, challenged by demurrer, as sufficient, is reversible error.

Commercial Union, etc., Co. v. Schumacher, 526, 546 (16).

IV. VERDICT.

33. *Effect.*—A general verdict for plaintiff finds in her favor every material allegation in the complaint.

Lake Erie, etc., R. Co. v. Douglas, 567, 576 (3).

34. *General.—Scope and Effect.*—A general verdict for plaintiff is a finding in plaintiff's favor of every material fact legitimately provable under the issues.

Metropolitan Life Ins. Co. v. Wathen, Gdn., 145, 149 (1).

35. *Interrogatories to Jury.—Answers.—Motion for Judgment on Answers.*—A motion for judgment on answers to interrogatories returned with a verdict is properly overruled when the answers and the verdict are not in irreconcilable conflict.

Lake Erie, etc., R. Co. v. Douglas, 567, 576 (4).

36. *Setting Aside.—Nominal Damages.—Improper Compromise.—Reversal.*—In an action to recover damages to an automobile hearse resulting from a collision with a street car, where the undisputed evidence showed that the cost of repairs was \$146.11, and that plaintiff paid \$35 for a new tire to replace one destroyed in the accident, and that the value of the hearse, after being repaired, was worth less than before the collision, a verdict in the sum of one dollar, *held*, excluding every other possible influence, to be in itself conclusive proof that it was agreed upon as a result of an improper compromise, and the judgment will be reversed.

F. & B. Livery Co. v. Indianapolis Traction, etc., Co., 203.

V. TRIAL BY COURT.

37. *Conclusions of Law.—Exceptions.—Effect.*—An exception to a conclusion of law that the same is erroneous, concedes the full and correct finding of the facts.

Miller v. Meadows, 337, 341 (3).

38. *Findings.—Facts Not Found.—Presumption.*—As to facts not found in a special finding of facts, it is conclusively presumed that they have not been proved.

Prafflin v. Schmidt, Admr., 496, 504 (3).

TRIAL—Continued.

39. *Findings of Fact and Conclusions of Law.—Sales.—Actions for Breach of Contract.—Damages.—Profits.*—Conclusions of law that do not show that gross retail profits, as such, were taken as the measure of damages, without due consideration of other facts that might materially affect the question of damages, and which, in an action for breach for failure to deliver goods under an executory contract of sale, are based upon findings of the actual value of the goods, as ordered, in the amount or equivalent of the retail price, and of other facts showing that the actual damage sustained was the difference between the value of the goods at the time and place for delivery and the contract price, are not erroneous, in view of the right of a vendee to hold his vendor liable for the increased cost of procuring goods elsewhere in case of the failure to deliver articles ordered for a particular purpose known to the vendor.

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 401, 437 (9).

40. *Venire de Novo.*—Where there was a special finding of facts and conclusions of law thereon, and the facts found are sufficient to sustain the conclusions of law in favor of plaintiff, the motion for a *venire de novo* was properly overruled.

Aldridge v. Clasmeyer, 43, 57 (11).

ULTRA VIRES—

Acts of agricultural society, estoppel, see **AGRICULTURE** 1.

USER—

See **ESTOPPEL**.

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VENIRE DE NOVO—

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VENUE—

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VERDICT—

See **TRIAL**.

Directing, see **TRIAL** 8-11.

Review, see **APPEAL** 76-96; **DAMAGES** 1.

VENDOR AND PURCHASER—

1. *Contract for Sale of Land.—Rescission.—Burden of Proof.*—In an action to recover money paid on the purchase price of real estate based on an alleged rescission of the contract involved, the burden is on the plaintiff to prove such rescission.

Pfaflin v. Schmidt, Admr., 496, 504 (4).

2. *Real Estate Contract.—Vendor Ready, Able and Willing to Perform.—Action for Money Paid on Price.—Rescission.*—In an action based on alleged rescission of a contract for the purchase of real estate, to recover money paid on the purchase price, a finding that the vendor and his administrator and heirs had

VENDOR AND PURCHASER—Continued.

always been ready, able and willing to carry out the contract, is an indirect finding against the plaintiff on the question of rescission. (*Dantzetser v. Cook*, 40 Ind. App. 65, distinguished.)

Pfafflin v. Schmidt, Admr., 496, 504 (5).

3. *Nonperformance by Purchaser.—Remedies of Parties.*—Where, in an action to recover purchase money paid because of an alleged rescission, the facts fail to show any rescission at the time the action was begun, on account of the continuous readiness, ability and willingness of the vendor to convey upon payment of the balance, it does not follow that the vendor is entitled to hold the money paid and the title also, free from any claim of the purchaser; but the latter would have the right, any time before the vendor agreed to a rescission, to tender the balance due, demand a conveyance, and, upon refusal, sue for the money paid; while the vendor, upon such failure by the purchaser to perform upon demand or within a reasonable time, has the right to sue for specific performance, or to treat the contract as rescinded and sue for damages for its breach, or to foreclose the equity of the purchaser in the real estate.

Pfafflin v. Schmidt, Admr., 496, 505 (6).

WAIVER—

Of insured's misrepresentations, see **INSURANCE** 12, 13.

Of notice, see **APPEAL** 17, 18.

Of question, see **APPEAL** 40-42, 51-53.

Of forfeiture, see **INSURANCE** 16.

Of defective complaint, failure to demur, see **PARTIES**.

WARRANTY—

See **SALES** 14-17.

WATERS AND WATERCOURSES—

What Constitutes.—Action for Obstruction.—In an action for damages and to enjoin the further obstruction of a watercourse, evidence that twenty-eight years ago the alleged watercourse was a creek eighteen inches to three feet wide and too deep to cross with a team, and had a regular channel, and, while it had been straightened and the banks worn down until a team could cross in places, there were still banks four feet deep where the stream was two or three feet wide, constitutes some evidence of a watercourse.

Opel v. Wetshett, 311, 313 (1).

WIFE—

See **HUSBAND AND WIFE**.

WILLS—

1. *Construction.—All Words and Clauses Considered.*—In searching a will for the testator's intention, every word and clause must be considered, and, if possible, given effect.

Hardy v. Smith, 688, 691 (2).

2. *Construction.—Intention of Testator.*—In construing the provisions of a will, the court must be guided by the intention of the testator.

Hardy v. Smith, 688, 691 (1).

3. *Construction.—"Or" Construed "And."*—When from the wording of a will it is obviously necessary in order to carry out the intention of the testator, the word "or" will be construed as "and."

Hardy v. Smith, 688, 692 (6).

WILLS—Continued.

4. *Construction.—Partial Intestacy.*—Unless compelled by the language used, a construction of a will resulting in partial intestacy will be avoided. *Hardy v. Smith*, 688, 691 (3).
5. *Construction.—Remainders.—Contingent or Vested.*—A remainder will not be construed to be contingent, if it can be construed to be vested. *Hardy v. Smith*, 688, 691 (4).
6. *Construction.—Vested Remainder.*—Under a will giving life estates in certain land to the husband and brother of testatrix, and, subject thereto, devising said land and all real estate owned at her death to a niece for life, or in case of her death prior to death of testatrix, or the death of the husband and brother, then at niece's death, or the death of the husband and brother, the fee simple of all said real estate to vest absolutely in two daughters of the niece, as tenants by entirety, the survivor to take the whole, and where the husband and brother died before the death of the testatrix, the daughters took a vested remainder in fee at the death of the testatrix. *Hardy v. Smith*, 688, 691 (5).
7. *Rights of Devisees and Legatees.—Election by Husband.—Necessity of.—Statutes.*—Where a wife's will devised her estate to her children and provided that they should support her husband, who was made executor, there was such a provision for him that he took under the will, without election, as provided by §3046 Burns 1914, Acts 1907 p. 73, and therefore he had no interest in her real estate under §3016 Burns 1914, Acts 1891 p. 71. *Chapman v. Bender*, 115.

WITNESSES—

- Credibility.—Relatrix in Bastardy Proceeding.—Moral Character.*—While the moral character of a relatrix in a bastardy suit may be proved as affecting her credibility as a witness, such character must relate to the time she testifies. *Kintz v. State, ex rel.*, 225, 230 (9).

WORDS AND PHRASES—

- "Accident arising out of and in the course of the employment," construction, see **MASTER AND SERVANT** 8.
- "And," use of "or" instead, construction, see **WILLS** 3.
- "Appeal," usage in statute, construction, see **OFFICERS** 1.
- "Employment," usage in statute, definition, see **MASTER AND SERVANT** 20.
- "Or" construed as "and," see **WILLS** 3.
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